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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF SCOTTSDALE, a municipal corporation,
Petitioner,

v.

JOYCE M. CORRIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF ARIZONA

JOHN P. FRANK*
JANET NAPOLITANO
MICHAEL O. MILLER
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003-1899
(602) 262-5311

WILLIAM E. FARRELL
Scottsdale City Attorney
CITY OF SCOTTSDALE
3939 Civic Center Plaza
Scottsdale, Arizona 85251
(602) 994-2405
Counsel for Petitioner

**Counsel of Record*

October, 1986

98 pp

QUESTIONS PRESENTED

1. Has the time come to decide whether or when enactment of a zoning ordinance is a compensable taking or a noncompensable regulation?

2. When, to protect mountain hillsides, a city forbids construction by owners above a given line and in substitution permits increased construction by those owners below that line, how shall the validity of such zoning be determined?

3. Is this hillside ordinance, at least on its face, valid under the United States Constitution?

LIST OF PARTIES

The caption of the case contains the names of all parties.*

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* Pursuant to Rule 28.1 of the Rules of this Court, petitioner states that the municipal corporation has no parent, subsidiaries, or affiliates.

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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF SCOTTSDALE, a municipal corporation,
Petitioner,

v.

JOYCE M. CORRIGAN,
Respondent.

The City of Scottsdale, through its counsel, petitions for a writ of certiorari to review the decision and judgment of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (see pp. 5a - 26a, *infra*) is reported at _____ Ariz. _____, 720 P.2d 528 (App. 1985). The opinion of the Arizona Supreme Court, which only considered on state law alone the issue of just compensation for a regulatory taking (see pp. 29a - 41a, *infra*), is reported at _____ Ariz. _____, 720 P.2d 513 (1986).

JURISDICTION

The judgment of the Arizona Court of Appeals was entered February 28, 1985. The Arizona Supreme Court denied the City of Scottsdale's timely petition for review on the taking question but accepted jurisdiction of respondent's cross-petition on the compensation question on November 14, 1985 (see pp. 45a - 46a, *infra*). The Arizona Supreme Court issued its opinion on June 4, 1986. The City of Scottsdale's timely motion for reconsideration was denied on July 16, 1986 (see p. 49a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

UNITED STATES CONSTITUTIONAL PROVISIONS AND CITY ORDINANCE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

The City of Scottsdale's zoning ordinance, Scottsdale, Az., Zoning Ordinance §§ 6.800-.807 (1977), is reproduced in the appendix to this petition (see pp. 53a - 65a, *infra*). [1] This ordinance is also known as the Hillside Ordinance.

STATEMENT OF THE CASE

This case concerns the City of Scottsdale's (City) zoning ordinance regulating the development that can occur on mountain and hillside areas within the City (see pp. 7a and 53a, *infra*). The Hillside Ordinance provides generally that development is prohibited above a line marking unstable slopes subject to land/rock movement, bedrock areas, slopes of 15% or greater, and shallow rocky mountain soils subject to severe erosion (see pp. 7a - 8a and 53a, *infra*). The Hillside Ordinance gives affected landowners transfer of density

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[1] There were immaterial changes to the ordinance in 1979, 1982 and 1985.

credits (TDRs) to develop adjacent land; [2] *i.e.*, the construction opportunities decreased above the line are increased below it (see pp. 8a - 9a and 59a, *infra*).

Respondent Corrigan owns 5,738 acres of undeveloped land, consisting of three contiguous parcels. She and her father owned the property prior to its annexation to the City. At the enactment of the Hillside Ordinance, the land was zoned as R-1-35, which allows one single-family residence on a lot of at least 35,000 sq. ft. The ordinance arguably restricts development to 2,215 acres; however, the TDRs available to Corrigan allow her to build in the development area the same number of housing units that she could have previously built without the restriction (see p. 31a, *infra*).

Corrigan brought suit in state court for inverse condemnation and a declaratory judgment finding the ordinance unconstitutional under both the state and federal constitutions. Because Corrigan had never submitted a development plan to the City nor applied for a building permit or the TDRs, the trial court evidence was limited to justifications for the ordinance and expert appraisal testimony which *assumed* facts as to the effect of the Hillside Ordinance on the property value. While the experts disagreed about whether the property was worth more before or after enactment of the ordinance, they agreed that the undevelopable portions would have no value standing alone (see pp. 23a - 24a, *infra*).

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[2] The ordinance speaks of "density credits" which are more generally known as transferable development rights. See p. 31a, *infra*. They mitigate the economic impact of restrictive density regulations that the cities think desirable. Even though zoning ordinances may have very severe economic impact without triggering the requirement of just compensation, *see, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no compensation due even though 87½% of value taken by ordinance precluding existing use), it is frequently desirable to avoid such burdens by mitigating them in some manner; *see also* Bozung, *Transferable Development Rights: Compensation for Owners of Restricted Property*, in 1984 Zoning and Planning Law Handbook 207 (J. Gailey ed. 1984); Note, *The Transferability of Development Rights*, 53 U. Colo. L. Rev. 165 (1981).

The trial court found in pertinent part as follows: 1) the Hillside Ordinance is not unconstitutional on its face; 2) the TDRs operate to prevent an unconstitutional "taking"; 3) the court must consider the impact of the ordinance upon the property taken as a whole, rather than the effect on individual portions thereof; 4) the Hillside Ordinance is not unconstitutional as applied to the respondent's property; and 5) since no plan relative to the property had been submitted to the City, the issue of whether the administrative action was unconstitutional was not ripe for determination (see pp. 74a - 75a, *infra).*

Corrigan appealed the trial court's decision of her federal and state constitutional law claims.[3] The court of appeals narrowed the questions presented to a facial analysis only, "whether the mere enactment of the Hillside Ordinance effected a taking of Corrigan's property" (see p. 16a, *infra).*

Employing a two-step analysis derived from *Agins v. City of Tiburon,* 447 U.S. 255 (1980), the court sought to ascertain whether 1) a legitimate state interest was substantially advanced by the ordinance; and 2) the ordinance denied the landowner the economically viable use of the land. While acknowledging that Corrigan "never seriously argued that the Hillside Ordinance does not substantially advance legitimate state interests" and that the trial court found the ordinance reasonably related to public health, safety, morals, and general welfare, the court nonetheless concluded that because the ordinance was not directed at a "deplorable condition" there was no "legitimate state interest" (see p. 18a, *infra).* In other words, the court required proof of a threatened or actual deplorable condition as a predicate for a "substantial advancement of a legitimate state interest."

Although the opinion purports to be a facial analysis ("mere enactment"), the court below also considered evidence as to both actual impact and the effect of the TDRs.

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[3] She also made arguments regarding the enactment and authorization of the ordinance which are not pertinent to this petition.

In assessing actual impact, the court considered the impact of the Hillside Ordinance on the property above the line prohibiting development [4] as compared with the effect of the ordinance on the rest of the property. While acknowledging that *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), instructs that a single parcel should not be divided into discrete segments for a taking analysis, the court distinguished that principle because the separate sections had different zoning designations. The court found significant economic impact because the expert witness appraisers had assigned no value to the mountainous area under the ordinance (see pp. 23a - 24a, *infra*).

The court concluded that the TDRs did not mitigate the ordinance's impact. It reasoned that the TDRs pointed to the invalidity of the ordinance because "[i]f this were a valid exercise of police power there would be no need for any form of compensation" (see p. 21a, *infra*).

From the absence of a legitimate state interest and from the presumed economic impact, the court held that the Hillside Ordinance was unconstitutional on its face. It affirmed the trial court's denial of the request for money damages based on an earlier state court decision (see p. 25a, *infra*); *Davis v. Pima County*, 121 Ariz. 343, 590 P.2d 459 (App. 1978), *cert. denied*, 442 U.S. 942 (1979).

The City and Corrigan petitioned and cross-petitioned to the Arizona Supreme Court as to the taking and just compensation issues, respectively. The court denied review on the taking issue, but granted Corrigan's petition as to just compensation (see p. 45a, *infra*). It vacated the decision of the court of appeals as to just compensation, relying solely on the Arizona Constitution (see p. 32a, *infra*). The matter has been remanded to the trial court for determination of damages under the state constitution (see p. 41a, *infra*).

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[4] This area was referred to as the Conservation Area, whereas the remaining property constituted the Development Area.

WHY THIS COURT HAS JURISDICTION

1. **Federal Question.**

The Arizona Court of Appeals stated that its invalidation of the Hillside Ordinance was "required by both the federal and state constitutions" (see p. 25a, *infra*). The court based its reasoning upon *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and the opinion intertwines federal and state law. The opinion does not contain any statement that an adequate and independent state grounds supports the court's holding. Under *Michigan v. Long*, 463 U.S. 1032 (1983), the federal taking question is presumptively raised for review.

2. **Finality.**

The only federal question presented in this case concerns the Taking Clause of the Fifth Amendment as read into the Fourteenth Amendment. That question was finally decided when the Arizona Supreme Court refused to reconsider its opinion, its own proceedings in turn declining to consider any federal questions in determining compensation. Prior to that time, the court's decision was not reviewable because "the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 633 (1981), quoting *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). The decision of the court of appeals thus became the final determination of the only federal question in the case.

Because future proceedings on state law compensation cannot affect the determination that a taking has occurred under the federal constitution, the federal question achieves finality for purposes of Supreme Court review. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-79 (1975). For example, in *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), this Court took jurisdiction of a First Amendment claim arising from a civil rights boycott although the Mississippi Supreme Court had remanded for

further damages calculations under state law. *See also Radio Station WOW v. Johnson,* 326 U.S. 120 (1945) (remand for an accounting does not affect finality).

The Arizona Supreme Court has foreclosed the possibility that a federal question may arise in this case by limiting the remand to state law compensation issues. We recognize, however, that this Court may choose to extend *San Diego Gas & Electric Co. v. City of San Diego, supra,* to cover situations like the present case. If this should be done, we request that certiorari be denied for lack of a final judgment so that we can re-petition upon completion of the proceedings after remand.

REASONS FOR GRANTING THE PETITION

I. The Zoning "Taking" Or "Regulation" Problem Cries For Solution; This Case Is A Good Vehicle.

A. A Question Which so Seriously Affects Every American Community Needs Decision.

The Justices occasionally confound the Court watchers with the unexpected: Justice Black and the Fourth Amendment, and Justice Frankfurter and the flag salute are examples. Justice Brennan's position on zoning and the Taking Clause is in this category. [5] We submit that the opportunity for a full development of Justice Brennan's view, and an opportunity to persuade him to a different view is itself a matter of public importance.

This case gives that opportunity. It allows the Court to determine whether a facial analysis of a zoning ordinance, which concededly is designed to enhance community safety and appearance and which provides for transferable development rights to affected landowners, can be regarded as a

[5] *See San Diego Gas & Electric Co. v. City of San Diego, supra,* 450 U.S. at 636-61 (Brennan, J., dissenting).

"regulatory taking." [6] That question, in turn, raises an important and recurring issue: whether the taking occurs at the time an ordinance is passed or at the time the local authorities reject the landowner's proposal to develop his land.

Resolution of the latter point is a matter of particular importance to this Court. In four prior cases this Court has been unable to reach the merits of whether monetary damages are owed for a regulatory taking because there was no assurance that a regulatory taking had actually occurred. *See Agins v. City of Tiburon,* 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank,* 105 S. Ct. 3108 (1985), *MacDonald, Sommer & Frates v. Yolo County,* 106 S. Ct. 2561 (1986). Certiorari has been granted in yet another just compensation case. *First English Evangelical Lutheran Church v. County of Los Angeles,* 106 S. Ct. 3292 (1986) (No. 85-1199, probable jurisdiction noted). The instant case fits well because here there is an express holding of a taking on the face of the ordinance.

The lack of decision for the past six years has left the courts below with insufficient guidance and no constitutional mandate establishing when a taking occurs—a prerequisite for a just compensation analysis. Because the Court has not been able to reach the compensation issue, communities have had to enact zoning ordinances without any plan for what, if any, compensation must be paid out of the local treasury. Without predictability, parties cannot ascertain their rights before litigating through the highest appellate level. This has resulted in considerable waste of judicial resources, and has shrouded municipal development in uncertainty. While we may disagree with Messrs. Berger and

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[6] "Regulatory taking" is shorthand for a *de facto* taking of private property by a land use regulation enacted under the police power. Cunningham, "Inverse Condemnation as a Remedy for 'Regulatory Taking,'" 8 Hastings Const. L.Q. 517 (1981).

Kanner on other issues, their assessment of the field seems quite accurate:

> With respect to defining a taking, the United States Supreme Court has thrown up its hands. It has repeatedly confessed its inability to establish any easily workable formula for determining what governmental acts constitute a taking and said that each case must be decided on an ad hoc basis on its own facts. While such fact-intensive examination has the virtue of flexibility, it also has led to a situation in which predictability has been so sacrificed that neither private nor public parties are able to ascertain what their rights are without first litigating through the highest appellate level. This wastes the parties' and courts' resources, and in some parts of the country has given rise to absurd legal situations.
>
> The present state of the law thus only provides incentives to litigation, as both sides to this durable controversy press their causes on the courts in an effort to reduce to precedent the infinitely variable facts of each dispute. While the flexibility employed by the Supreme Court thus far has much to commend it, the nation now desperately needs definitive guidance as to where flexibility ends and precedent begins.

Berger and Kanner, "Thoughts on *The White River Junction Manifesto:* A Reply to the 'Gang of Five's' Views on Just Compensation for Regulatory Taking of Property," 19 Loy. L.A.L. Rev. 685, 692-93 (1986) (footnotes omitted).

B. This Court Recognizes the Chaos of the Law and Can Now Resolve It.

This Court has been struggling mightily with the question of whether allegedly excessively burdensome zoning is to be regarded as a taking of Fifth Amendment quality which requires just compensation, or is a Fourteenth Amendment regulation which may be invalidated but which does not require compensation. The best discussion of the problem and of this Court's nondecision of it is in *Williamson County Re-*

gional Planning Commission v. Hamilton Bank, supra, 105 S. Ct. at 3122-24 (1985). We fully appreciate that Justice Brennan there expresses the view that an excessive zoning is to be regarded as a Fifth Amendment style taking, but we submit, with all of the respect which is so properly due, that the majority in the case just cited clearly reserves the question which Justice Brennan was there prepared to decide. With even greater earnestness, we submit that Justice Brennan is wrong in this point of view and that there ought to be a fair run at seeking to persuade him to the contrary. Indeed, the Court unanimously agreed that the question of compensation for what has been termed a temporary regulatory taking has not been determined by this Court. *United States v. Riverside Bayview Homes, Inc.,* 106 S. Ct. 455, 460 n.6 (1985). The instant case squarely puts the question of whether excessive zoning (if it is excessive—we shall argue to the contrary in the next section) is a due process violation, or is a Fifth Amendment violation as that Amendment is read into the Fourteenth Amendment.

Since *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922), this Court has recognized that a regulation under the police power can go "too far," and become a taking.[7] *See also Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *United States v. Kansas City Life Insurance Co.,* 339 U.S. 799 (1950); *United States v. General Motors Corp.,* 323 U.S. 373 (1945); *Nectow v. City of Cambridge,* 277 U.S. 183 (1928). But this Court has not been able to decide whether a monetary remedy is constitutionally required in "appropriate" regulatory cases. *MacDonald, Sommer & Frates v. Yolo County, supra,* 106 S. Ct. at 2572-73. This is because, as Justice Blackmun developed in the passage just cited in *Riverside Bayview Homes,* there is no determination as to

[7] Although the scope of *Pennsylvania Coal* arguably is under reexamination, *Keystone Bituminous Coal Ass'n v. Duncan,* 106 S. Ct. 1456 (1986) (No. 85-1092, certiorari granted), the central tenet of that case remains intact. *See United States v. Riverside Bayview Homes, supra,* 106 S. Ct. at 459.

whether we are dealing with true just compensation or a more conventional substantive due process invalidation. Additionally, the Court will be entertaining arguments on yet another "just compensation" case shortly, with which the instant case fits perfectly. [8] If we are to live under a system of mixed substantive due process and traditional Fifth Amendment values, for the sake of decent community planning this Court needs at least to begin to delineate the boundary over which a community must pass before being subject to money damages.

II. The Court Of Appeals Erred In Holding That TDRs Prove Invalidity Of The Police Power; "Legitimate State Interest" Requires A "Deplorable Condition"; And The Ordinance Does Not Advance Legitimate State Interests.

A. TDRs Go to the Proof That a Taking Has Not Occurred.

The court of appeals transmuted the instruction of *Penn Central* that TDRs "mitigate whatever financial burdens the law has imposed on [landowners]," 483 U.S. at 137, into a holding that TDRs are proof of the invalidity of the use of the police power (see p. 21a, *infra*). This argument — that TDRs must indicate a taking because why else would a government "pay" using TDRs if it was not required — imposes an all-or-nothing restriction on legitimate government interests and private property rights. The Court has never read such inflexibility into the taking clause. *See Penn Central Transportation Co. v. City of New York, id.; Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962). Rather, transfer mechanisms by which governments redistribute the impact of regulation are inherently remedial and should not be used against them to invalidate their ordinances. Note,

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[8] *First English Evangelical Lutheran Church v. County of Los Angeles, supra,* unlike the case at bar, does not directly involve a taking. Rather, the California Court of Appeal affirmed the county's successful Motion to Strike the inverse condemnation claim. Jurisdictional Statement at 2. There was no finding of a taking.

"The Transferability of Development Rights," *supra,* 53 U. Colo. L. Rev. at 172-74.

B. "Legitimate State Interest" Does Not Require a "Deplorable Condition."

"Legitimate state interest" as reflecting the police power of the State in a zoning ordinance has been broadly respected. *Berman v. Parker,* 348 U.S. 26 (1954) (sustaining a redevelopment project aimed at ridding an area of slums); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (sustaining ordinance restricting land use to one-family dwellings). On the other hand, the court's requirement of a "deplorable condition" is a new formulation, violating the prescription that "a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.' " *Nectow v. City of Cambridge, supra,* 277 U.S. at 187-88 (quoting *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)).[9] The Hillside Ordinance substantially advances a long-accepted legitimate state interest—the safety and quality of life in the community. This Court should reaffirm that holding.

C. Hillside Zoning Ordinances, Necessary to Preserve the Safety and Beauty of Our Urban Mountain Ranges, Advance "Legitimate State Interests."

At least the western cities often have mountains within their borders. Inescapably they present problems of beauty,

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[9] Not even another panel of the Arizona Court of Appeals believes quite what the panel said in the instant case. *See Ranch 57 v. City of Yuma,* 1 CA-CIV 8150 (filed Sept. 2, 1986; Petition for Review filed Sept. 17, 1986), slip. op. p. 12, n.3 (1986), in which the court refuses to follow *Corrigan* in this respect. While Arizona law arguably now rejects the "deplorable condition" standard, it is the law of the instant case and the City has no avenues of redress other than this Court.

erosion and safety. Cities in mountainous regions of our country typically restrict the construction of buildings and roads through the use of hillside or slope density ordinances. *See, e.g.*, Simi Valley, Calif., Code § 9-1.606 (1986). Although hillside ordinances vary from community to community, they generally fall into two categories. The first type prohibits or significantly limits development above a certain percentage of slope. For example, Corte Madera, California, prohibits all development above a 40% slope, Corte Madera, Calif., Code § 18.18.150(2) (1983), while Simi Valley, California, allows one unit per 40 acres above a 20% grade, Simi Valley, Calif., Code § 9-1.1607 (1986) (residential density calculations). The second category of ordinances operate on a sliding scale with the number of dwelling units per acre decreasing as the percentage of slope increases.

Cities adopting hillside zoning ordinances or developing community plans with slope density formulas significantly advance legitimate state interests. The regulations enhance the public health, safety, and welfare; maintain open space; retain scenic resources; enhance property values; and preserve the existing ecological balance. *See* Simi Valley, Calif., Code § 9-1.1601 (1986) (purpose); Los Angeles, Calif., Mulholland Scenic Parkway Specific Plan § 2 (purposes) (proposed ordinance, May 1986). Such essential uses of police power should not be curtailed or invalidated without this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted. Additionally, since this case offers the complement (a finding of a taking) that is missing in *First English Evangelical Lutheran Church v. County of Los Angeles,* 106 S. Ct. 3292 (1986) (No. 85-1199), this case should be heard as a companion to it.

Respectfully submitted,

John P. Frank*
Janet Napolitano
Michael O. Miller
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003-1899
(602) 262-5311

William E. Farrell
Scottsdale City Attorney
CITY OF SCOTTSDALE
3939 Civic Center Plaza
Scottsdale, Arizona 85251
(602) 994-2405
Counsel for Petitioner

**Counsel of Record*

October, 1986

APPENDIX

Opinion of Arizona Court of Appeals

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOYCE M. CORRIGAN, Plaintiff-Appellant v. CITY OF SCOTTSDALE, a municipal corporation, Defendant-Appellee.	1 CA-CIV 6300 DEPARTMENT A OPINION

Appeal from the Superior Court of Maricopa County
Cause No. C-359908
The Honorable James Moeller, Judge
REVERSED

Fennemore, Craig, von Ammon, Udall & Powers, P.C.
by James Powers
Attorneys for Appellant — Phoenix

Richard Filler, Scottsdale City Attorney
by Donald O. Loeb, Assistant City Attorney
Attorneys for Appellee — Scottsdale

G R A N T, Judge

In this appeal we consider the validity of the City of Scottsdale's zoning ordinance establishing the Hillside District. In November, 1977 Scottsdale rezoned the area in and around the McDowell Mountains into the Hillside Conservation Area (Conservation Area) and the Hillside Development Area (Development Area). Essentially no new development was permitted on land falling within the Conservation Area. Joyce Corrigan, appellant (Corrigan), who owns land within

the Hillside District, brought suit to declare the ordinance unconstitutional and prayed for monetary damages for taking of property. Subsequently Corrigan also unsuccessfully sought to raise the issue in the trial court of whether the ordinance is authorized by the state enabling legislation. After an adverse judgment sustaining the validity of the ordinance Corrigan brought this appeal.

The issues raised are:

(1) whether the trial court erred in not considering evidence of the intent of the Planning Commission and its staff;

(2) whether the Hillside District zoning ordinance is authorized by state law;

(3) whether the Hillside District zoning ordinance is an unconstitutional exercise of police power;

(4) whether appellant is entitled to money damages for an illegal taking.

The background facts are as follows. Corrigan owns a large parcel of land comprising approximately 4,800 undeveloped acres. Touching this central parcel at a single point at its northwest corner is a smaller parcel of approximately 608 undeveloped acres also owned by Corrigan. Corrigan owns a third parcel of approximately 330 undeveloped acres which connects with the central parcel at the central parcel's southwest corner. All of this property is located within the City of Scottsdale and is part of, or close to, the McDowell Mountains.

The McDowell Mountains, located at the north end of the City of Scottsdale, constitute a unique geographic area. The mountains and surrounding hillsides are the only hilly or mountainous terrain within the city limits. While the elevation of the developed part of Scottsdale is approximately 1,250 feet, elevations in the McDowell Mountains rise to over 4,000 feet. As of November, 1977 no development of any kind was located in or near the McDowell Mountains within the corporate limits of Scottsdale.

Corrigan's property previously had been part of the DC Ranch, owned by Kemper Marley [1] and E. E. Brown. In the early 1960's the ranch lay outside the corporate boundaries of Scottsdale. In 1963, Scottsdale annexed the southern part of the ranch, including Corrigan's property. The newly annexed property was zoned R-1-35, a classification permitting single family residences on lots of at least 35,000 square feet. This zoning classification was generally regarded as a "holding" classification for rural property which was not ready for development.

After the death of E. E. Brown in 1966, Corrigan purchased from Brown's children their one-half interest in the estate, which included a one-fourth interest in the partnership. Corrigan paid in excess of two million dollars for the children's interest. Upon the death of Brown's widow, the partnership between Marley and Brown was liquidated and its real estate holdings partitioned. The estate of E. E. Brown was awarded certain land, including the property involved here, which the probate court in 1973 distributed to Corrigan as assignee of Brown's children. As part of these partition proceedings property owned by Corrigan's father is also affected by the challenged ordinance.

On November 15, 1977 the zoning ordinance of Scottsdale was amended by adding sections 6.800 through 6.807, which create the Hillside District. Scottsdale, Ariz., Ordinance 455 § 6.800 - .807 (1977) [hereinafter cited as Ordin. § _____]. The Hillside District ordinance established two areas, the Conservation Area and the Development Area, separated by a "no development" line. Ordin. § 6.802. Land within the Conservation Area, which is above the "no-development" line, is set aside solely for the conservation of permanent natural open space, while land within the Development Area can be developed subject to certain limitations. Ordin. §§ 6.802, .805 - .807. The no-development line is located where any of the following conditions occur: unstable slopes

[1] Kemper Marley is appellant's father.

subject to rolling rocks, rockfalls or landslides; bedrock areas; slopes of 15 percent or greater; and shallow, rocky mountain soils subject to severe erosion. Ordin. § 6.802(A). These criteria identify where a mountain begins. An adjustment procedure exists as to determination of the no development line. Ordin. § 6.806(C).[2] Pursuant to a 1979 amendment, the Conservation Area shall not "be required to be more than eighty (80) percent of any land held in single common ownership that existed on October 8, 1977." Ordin. § 6.806 (C)(2).

Land within the Conservation Area is to be "legally secured for the conservation of permanent natural open space through easements or dedication." Ordin. § 6.806(A)(3). No buildings, structures or impermeable surfaces are permitted in the Conservation Area. Ordin. § 6.806(B). Density credits are allotted for land above the no development line, Ordin. § 6.806 (A)(1), which may be transferred for use in adjacent

[2] Under the adjustment procedure the no-development line can be moved to a point where two of the specified conditions occur. Ordin. § 6.806(C).

land within the Development Area.[3] These density credits are also referred to as Transferable Development Rights.

Land within the Development Area is subject to certain limitations imposed by the Hillside Ordinance. Depending on the degree of slope a fixed percentage of a site sought to be developed must be retained in its natural state. Ordin. § 6.807 (A)(1). A density bonus is allowed where a developer sets aside an extra 20% natural area than is otherwise required for a proposed development of single-family residences in an R-1 zone. Ordin. § 6.807(B).

A study of ownership patterns within the Hillside District showed that the land remained in a few large ownerships.

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[3] Ordin. § 6.806(A) states:

A. *General provisions*

1. Although development shall not be allowed in the Hillside Conservation area, density credit may be transferred to adjacent Hillside Development land contained within the application, subject to:
   a. Density credit derived from existing underlying zoning in the HC area, at the following rates:
      (1) R1-43: 0.8 units per acre
      (2) R1-35: 1.0 units per acre
   b. Regulations of this ordinance and other applicable City ordinances which will apply to development in the HD area;
   c. Density limitations of the zoning in the HD area as ultimately approved by the City Council:
   d. The ownership pattern on record on October 8, 1977, the date of the public notice of the zoning ordinance amendment to establish the Hillside District.
2. Rezoning of the HD area to achieve the higher densities made available through density credit transfer shall result in removal of the underlying zoning in the JC area.
3. The land within the Hillside Conservation area shall be legally secured for the conservation of permanent natural open space through easements or dedication.
4. No grading, filling, clearing or excavation of any kind shall be allowed in the Hillside Conservation area.

This study of the ownership patterns revealed that owners of property in the mountains, including Corrigan, had developable areas below the no-development line (within the so-called "receiving area") sufficient in size to accommodate the transfer of density credits from the land above the no-development line within the Hillside Conservation District.

The no-development line does not impinge on the two small parcels of land owned by Corrigan; however, of the approximately 4,800 acres contained in the central block, 80% or 3,836 acres, lie above the no development line. Assuming Corrigan could obtain the maximum adjustments on the placement of the no-development line, 3,523 acres, or 74% of the central block, still would lie within the designated conservation area.

I.
INTENTIONS OF THE DRAFTERS OF THE ORDINANCE

At trial Corrigan introduced evidence concerning the intent of the City's Planning Commission and its staff with respect to promulgation of the Hillside Ordinance. This evidence tended to show that the primary motivation in proposing the ordinance was to preserve the McDowell Mountains in their natural state for the benefit of all residents of the City. Distilled, Corrigan's argument is that the primary purpose of the ordinance is to obtain a permanent mountain preserve for the public without cost. The trial court concluded that as a matter of law inquiry into the motives behind enactment of the ordinance was precluded. We agree.

Zoning ordinances are legislative acts. *Wait v. City of Scottsdale,* 127 Ariz. 107, 618 P.2d 601 (1980). Courts will not inquire into the motives of the legislative body which enacts a particular piece of legislation. *Id.; Tucson Community Development & Design Center, Inc. v. City of Tucson,* 131

Ariz. 454, 641 P.2d 1298 (App. 1981).[4] Nor will courts inquire what evidence or reasons were presented to sway the legislative body. *Tucson Community Development & Design Center, Inc., v. City of Tucson.* The principal test to be applied by a trial court on the issue of a zoning ordinance's constitutionality is whether the zoning bears a substantial relation to the public health, safety, morals or general welfare. *Cardon Oil Co. v. City of Phoenix,* 122 Ariz. 102, 593 P.2d 656 (1979); *Bartolomeo v. Town of Paradise Valley,* 129 Ariz. 409, 631 P.2d 564 (App. 1981). As long as the reasonableness of the ordinance in question is fairly debatable the courts must uphold the zoning ordinance. *Id.; Dye v. City of Phoenix,* 25 Ariz. App. 193, 542 P.2d 31 (1975).

Corrigan apparently accepts these general propositions but argues that legislative history is a proper method of ascertaining the legislative intent or purpose in enacting a law. *E.g., Federal Energy Administration v. Algonquin SNG, Inc.,* 426 U.S. 548, 96 S. Ct. 2295, 49 L. Ed. 2d 49 (1976); *State v. Barnard,* 126 Ariz. 110, 612 P.2D 1073 (APP. 1980); *State ex rel. Swartout v. Civil Service Commission,* 25 Wash. App. 174, 605 P.2D 796, *Cert. Denied,* 449 U.S. 992 (1980). Legislative intent is relevant, however, only in *interpreting* a statute or ordinance. Corrigan argues that her evidence aided in defining the phrase "permanent natural open space." We do not see how evidence, tending to show that the City wanted, through the Hillside Ordinance, to establish a public mountain preserve in the McDowell Mountains, would facilitate a knowledgeable interpretation of that phrase. We therefore find no error.

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[4] No equal protection claim based on racial discrimination is involved, which would permit an inquiry into the motives of the municipal body. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

II.
AUTHORIZATION OF ORDINANCE UNDER STATE LAW

Corrigan also argues on appeal that the Hillside Ordinance is not authorized by state enabling legislation. It is clear that the Arizona Legislature has preempted the field of zoning legislation and has set forth guidelines for cities. *Committee for Neighborhood Preservation v. Graham,* 14 Ariz. App. 457, 484 P.2d 226 (1971). *See Public Regulation of Private Land Use in Arizona: An Analysis of its Scope and Potential,* 1973 Law and Soc. Order 747. Corrigan asserts that the state has refused to give municipalities the right to use zoning power to set aside land for permanent open space. Scottsdale counters this assertion by arguing that Corrigan failed to timely raise this issue in the lower court, and that it should not be considered on appeal. Alternatively, it is argued that the ordinance is authorized under state enabling legislation.

The complaint in this action was filed on November 21, 1977. After extensive discovery the matter went to trial beginning on November 19, 1980 and concluded with final argument on April 9, 1981. Shortly before final argument, and after both sides rested, Corrigan filed a pleading entitled "Notice of Plaintiff's Basis for Argument." The notice indicated for the first time that Corrigan asserted that the Hillside Ordinance exceeded the scope of Scottsdale's zoning power as established by state enabling legislation (A.R.S. § 9-462 *et seq.*). No previous pleading or memorandum had dealt with or mentioned this issue. Scottsdale objected to the insertion of this new issue as untimely and prejudicial. The trial court ruled that the issue was untimely and inclusion of the issue would be unfair to Scottsdale.

An appellant generally may not raise issues on appeal that were not properly raised in the court below. *Seven G Ranching Co. v. Stewart Title & Trust,* 128 Ariz. 590, 627 P.2d 1088 (App. 1981); *Cohen v. State,* 121 Ariz. 20, 588 P.2d 313 (App. 1977), *aff'd in part, vacated in part,* 121 Ariz. 6, 588

P.2d 299 (1978); *Payne v. Payne*, 12 Ariz. App. 434, 471 P.2d 319 (1970). Corrigan recognizes this principle but in support of presenting this issue relies on the principle that a court will avoid deciding the constitutionality of a statute, if the case may be decided on other grounds. *E.g., State v. Church*, 109 Ariz. 39, 504 P.2d 940 (1973); *Pendley v. Mingus Union High School District No. 4*, 17 Ariz. App. 512, 498 P.2d 586, *vacated*, 109 Ariz. 18, 504 P.2d 919 (1972).

In *Pendley v. Mingus Union High School District No. 4* the court raised *sua sponte* an issue to avoid addressing the constitutionality of the school district's regulation of male students' hair length. On appeal both parties had briefed and argued the constitutional issues. The court stated:

> Although the parties before us delve deeply into the constitutional aspects of the rights of this student and the authority of school officials to regulate his hair length, we have concluded, without invocation of constitutional law, that the regulation is in excess of the school district's authority .... Although the issue appears to have been raised in the trial court, practically all arguments on appeal have been devoted to the constitutional aspects. Since the authority of the school board is in question, and in view of the normal preference to decide on a nonconstitutional basis where that avenue is open, [citation] we will address ourselves *sua sponte* to the question of the school district's authority to enact the regulation in question.

Id. at 514, 498 P.2d at 588. In *Pendley*, unlike here, the issue raised *sua sponte* had been fully addressed in the trial court.

The applicable law is set out in the decision of *Town of Scottsdale v. State ex rel. Pickrell*, 1 Ariz. App. 85, 399 P.2d 706 (1965). That case involved an action to declare certain annexation ordinances, as well as the city charter authorizing them, illegal. The City of Scottsdale conceded in the trial court that imperfections in annexation procedures rendered the ordinances unlawful. Nevertheless, the trial court

proceeded to determine the issue as to the validity of the city charter.

On appeal the *Town of Scottsdale* court stated:

> There is respectable authority to the effect that a court will not usually consider a constitutional question when the case can be determined without ruling upon that question. It is our opinion that this is not a question of "lack of jurisdiction in the trial court" but rather a question as to the exercise of judicial discretion in relation to the trial of the issues then presented. We will not review the exercise of discretion by the trial court but will review the validity of the trial court's determination of the constitutional issue.

Id. at 87, 399 P.2d at 708. The decision at issue is also a discretionary one.

It is unfortunate that all issues relating to the validity of these ordinances were not raised and considered in one case. While we are not convinced that inclusion of this issue would have necessitated undue prolonging of the trial of the entire matter, Scottsdale was placed at a serious disadvantage by the untimely raising of this issue. Furthermore as pointed out in the findings of the trial court, the pleadings and the evidence did not address the issue; nor was the issue raised with any specificity. We therefore conclude that there was no abuse of discretion by the trial court in refusing to consider whether the Hillside Ordinance was authorized by state enabling legislation. This brings us to the central issue.

III.
CONSTITUTIONALITY OF THE HILLSIDE DISTRICT AMENDMENT

The central issue in this appeal is whether the Hillside Ordinance is unconstitutional as a taking without just com-

pensation.[5] In part the fifth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment, states:

> [N]or shall private property be taken for public use, without just compensation.

In assessing the constitutionality of municipal zoning ordinances certain principles have been established. The rule that the trial court will be upheld if there is evidence in support of the judgment is not the applicable rule in zoning cases. However zoning ordinances are presumed to be valid. *City of Phoenix v. Oglesby,* 112 Ariz. 64, 537 P.2d 934 (1975); *Peabody v. City of Phoenix,* 14 Ariz. App. 576, 485 P.2d 565 (1971). This court does not sit as a super-zoning commission, and will not pass judgment on the wisdom of the ordinance. The function of the Court of Appeals is to determine whether the record shows a reasonable basis for action of the zoning authority, and if the reasonableness of the ordinance is fairly debatable it will not be disturbed. *City of Tempe v. Rasor,* 24 Ariz. App. 118, 536 P.2d 239 (1975). The burden rests on the party asserting invalidity to clearly and

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[5] Article 2, Section 17 of the Arizona Constitution provides in part: Private property shall not be taken for the private use .... No private property shall be taken or damages for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the State treasury for the owner on such terms and conditions as the Legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

affirmatively demonstrate that the ordinance is unconstitutional. *City of Phoenix v. Collins,* 22 Ariz. App. 145, 524 P.2d 1318 (1974).

Corrigan has not submitted a plan for development of her property under the ordinance. In *Agins v. City of Tiburon* the United States Supreme Court held that:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions .... Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 111-12 (1980). *See also Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Aptos Seascape Corp. v. County of Santa Cruz,* 138 Cal. App. 3d 484, 188 Cal. Rptr. 191 (1982), *appeal dismissed* _____ U.S. _____, 104 S. Ct. 53, 78 L. Ed. 2d 73 (1983). Similarly we are called upon to decide only whether the mere enactment of the Hillside Ordinance effected a taking of Corrigan's property.

There are no set formulas for determining at which point a regulation effects a taking of property. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962). Rather a two step process is required. First, we must determine whether a legitimate state interest is substantially advanced by the ordinance at issue. *Agins v. City of Tiburon.* Second, we focus on whether the ordinance denies the owner the economically viable use of the land. *Id.* Ultimately the issue is whether the public at large, rather than a few landowners should bear the burden of an exercise of police power. *Id.; Penn Central Transportation Co. v. City of New York.*

Police power is based on the necessity to safeguard the public interest. Its concept is a dynamic and changing accommodation to the complexities of modern society. Because

of the nature of police power, its exercise frees a governmental body from liability for compensation for resulting private losses. However, exercise of police power does not include the power of eminent domain. Police power cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights relating to the inviolateness of private property. An arbitrary, conceived regulation will be nullified as a disguised attempt to take private property for public use without resort to eminent domain. A strong public desire to improve public conditions is not enough to warrant achieving the desire by a shorter cut rather than the constitutional way of paying for the change. *Transamerica Title Ins. Co. v. City of Tucson,* 23 Ariz. App. 385, 533 P.2d 693 (1975).

In this case we are required to determine whether the use of Transferable Development Rights or density credits to preserve open space is an exercise of the police power or of the power of eminent domain. Footnote 5 *ante. See* Note, *The Unconstitutionality of Transferable Development Rights,* 84 Yale L.J. 1101 (1975). In making this determination we must differentiate between a valid application of the noncompensatory governmental police power, and those actions which constitute an exercise of eminent domain requiring payment of just compensation. *See* Note, *Rezoning Subject to Conditions,* 18 Ariz. L. Rev. 786 (1976). We acknowledge the power of a municipality to impose conditions on zoning or rezoning but such conditions cannot exceed the scope of police power. *Id.* The primary function of police power is to safeguard the public interest from private endeavors posing potential threats to the general welfare. However, in the final analysis zoning power may not be substituted as a guise for eminent domain. Municipal attempts to usurp police power in order to avoid just compensation will be struck down. Public need is the *sine qua non* of reasonableness. Does a deplorable condition exist or is it likely to occur under existing zoning? *See id.*

Corrigan on appeal and at the trial level never seriously argued that the Hillside Ordinance does not substantially advance legitimate state interests. As the first step the trial court found that the ordinance is reasonably related to public health, safety, morals, and general welfare. Among the safety concerns justifying the Hillside Ordinance were: minimizing the harm from the phenomenon known as rolling rock; [6] preventing rock slides due to blasting; reducing the damages from washouts and landslides; and avoiding the difficulties in fighting fires in mountainous terrain. Also, evidence produced at trial revealed that the McDowell Mountains, which are Scottsdale's only mountains, enhance property values in their natural state. Furthermore, development in the mountains could result in unsightly scarring. [7] However, public interest in aesthetics, standing alone, is often too vague to offset substantial injury to a landowner in a rezoning case. *Brown v. Dougherty,* 250 Ga. 658, 300 S.E.2d 509 (1983). *See also City of Austin v. Teague,* 570 S.W.2d 389 (Texas 1978). The evidence does not support nor did the trial judge find that a deplorable condition exists or would exist without the Hillside Ordinance. Although the trial court found certain safety concerns it did not find there would be a substantial threat to public safety without the ordinance. Obviously there often is and has been building in mountainous or hilly areas within the Valley of the Sun. Therefore the ordinance was not a valid exercise of police power.

The second step focuses on whether the ordinance denies the landowner an economically viable use of the land. *Agins*

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[6] The term "rolling rock" describes the loosening of rock formations due to erosion and weather conditions. The loosened formation then slides downward.

[7] Aesthetics are a proper consideration in determining the validity of a zoning ordinance, especially where aesthetics are auxiliary to more traditional public interests. *City of Scottsdale v. Arizona Sign Ass'n, Inc.,* 115 Ariz. 233, 564 P.2d 922 (App. 1977); 3 Rohan, *Zoning & Land Use Controls* §§ 16.04 - 16.04(3), at 16-49 to 16-124 (1978).

v. City of Tiburon. In assessing the financial impact of the Hillside Ordinance it must be borne in mind that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 43 S. Ct. 158, 159, 67 L. Ed. 322, 325 (1922). Thus, to constitute a taking, a regulation must preclude use of land for any purpose for which it might reasonably be adapted. *Wait v. City of Scottsdale.* It is further recognized that rezoning does not constitute a taking merely by causing a decrease in property value. *Cardon Oil Co. v. City of Phoenix; City of Phoenix v. Fehlner,* 90 Ariz. 13, 363 P.2d 607 (1961). The prohibition against taking private property for public use without just compensation, contained in both our state and federal constitutions, is designed to protect not only the landowner's proprietary interest, but also his or her economic interest. One of the purposes of the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation was to bar Government from forcing some people to bear public burdens which in all fairness and justice should be borne by the public as a whole. *Armstrong v. U.S.,* 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L. Ed. 2d 1554, 1561 (1960). As cited in *State ex rel. Herman v. Southern Pacific Co.,* 8 Ariz. App. 238, 240, 445 P.2d 186, 188 (1968), "To establish that an ordinance is confiscatory, it must be shown that the restrictions preclude use of the property for 'any purpose to which it is reasonably established.' *Rubi v. 49'er Country Club Estates, Inc.,* 7 Ariz. App. 408, 440 P.2d 44 (1968)." *Klensin v. City of Tucson,* 10 Ariz. App. 399, 403, 450 P.2d 316, 320 (1969).

When reviewing a zoning ordinance the court must determine whether it is confiscatory or merely unreasonable and arbitrary. A zoning ordinance will be deemed confiscatory if it effectively deprives a property owner of the beneficial use of his or her property by precluding *any* reasonable use of it. *City of Hollywood v. Hollywood, Inc.,* 432 So.2d 1332 (Fla.

Dist. Ct. App. 1983). No one in this case denies that the Hillside Ordinance deprives appellant of any use of her main parcel of land.

Three major factors are to be considered in assessing whether or not a taking has occurred: (1) the character of the government action involved; (2) whether the land use restriction on real property may be held to constitute a taking if it is not reasonably related to a valid public purpose; and, (3) the economic impact of the regulation on the claimant. *Penn Central Transportation Co. v. City of New York.*

The ultimate resolution of whether the government has unconstitutionally taken private property follows an ad hoc factual determination that the full community rather than an individual property owner, should fairly assume the costs of the governmental action. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).

Although the preservation of open space in the McDowell Mountains is a legitimate state interest, we must determine whether it can be done through the exercise of police power or whether it must be done through eminent domain with the required payment of just compensation. Zoning finds its authority in the police powers while eminent domain is the right and power of a sovereign state to appropriate private property to uses for the public good. *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637 (1962). There may be a conflict between eminent domain and police power as to which is the superior right in a particular fact situation. Courts must consider how the rights of the public, either under the necessity for taking of land for public use or benefit under eminent domain, or the denial of the particular use under police power, are related to the general welfare of the segments of the public in conflict. *Id.*, dissent by Lockwood, J. There is a balancing of interests involved.

In the context of the case before us we are faced with an ordinance which is an attempted hybrid between police pow-

er and eminent domain. The city claims this action is a legitimate exercise of police power and yet it attempts a form of compensation by way of transfer of density credits. If this were a valid exercise of police power there would be no need for any form of compensation.

We recognize the argument that the transferability of development rights, also termed density credits, provides an alternative to either buying the land sought to be preserved (which most municipalities cannot afford) or simply abandoning any attempt to preserve scenic or ecologically sensitive areas. *See The Transferability of Development Rights,* 53 U. Colo. L. Rev. 165 (1981).

> If a land use restriction deprives a landowner of any reasonable use of the land, or if the landowner cannot realize a reasonable economic return on his investment in the land, then the courts will hold that the restriction results in a "taking". Typically, government then has two choices: either to forego enforcing the restriction, or else to acquire the land through condemnation and give the landowner just compensation.
>
> The second choice, condemning the regulated land, is not usually feasible because few governments possess the funds necessary for acquisition of private lands for aesthetic purposes. Thus, the other option, not enforcing the restriction, is the more usual course .... A proposed alternative to this dilemma is the concept of "fair compensation," by which a landowner is compensated for land use restrictions to the extent necessary to assure a reasonable return on his parcel of land.

Id. at 166-167 (footnotes omitted).

The question is thus presented: whether fair compensation can be given by transferring development rights as is attempted in the ordinance presently before us.

In determining whether a regulation effects a taking of property, the court will generally not divide a single parcel of land into discrete segments. *Penn Central Transportation Co. v. City of New York; DeMarie v. City of Lake Forest,* 93

Ill. App. 3d 357, 417 N.E. 2d 641 (1981). Several courts have recognized an exception where governmental action divides contiguous property under single ownership into separate zones with different zoning designations. *E.g., American Savings & Loan Ass'n v. County of Marin,* 653 F.2d 364 (9th Cir. 1981); *Aptos Seascape Corp. v. County of Santa Cruz.*

In *Aptos* the California Appeals Court held:

> In other words, when governmental action has divided contiguous property under single ownership into separate zones, and has restricted development in one of those zones, a provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred.

138 Cal. App. 3d at 496, 188 Cal. Rptr. at 198. In that case Aptos Seascape Corporation owned 110 acres of real property, with 40 acres above the 100-foot contour line (the benchlands) and 70 acres below the contour line (subject property) which included beachlands, arroyos, and palisades. The 110 acres were purchased in 1963 and at that time were rezoned residential, with a commercial hotel use permitted on one portion of the benchlands. In 1972 the County of Santa Cruz rezoned the subject property as U-BS (unclassified—special building site area regulations) and the benchlands R-1-6-PD (one family residence—planned development district: 6,000 sq. ft. minimum site area). The ordinance essentially prohibited any development on the 70 acres of beachlands. Seascape filed suit alleging a taking of the subject property. Seascape had not filed a development plan or plans under the new ordinances. The appeals court in *Aptos* said that although development of the subject property is prohibited, the county's ordinances permitted granting of compensating densities to Seascape on the benchlands and its other nearby properties. Therefore, the court concluded that mere enactment of the ordinance in question did not constitute a taking.

In *Fifth Avenue Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978), the owner of a 20 acre parcel of land brought suit asserting, among other things, that the rezoning of its property pursuant to a 1973 zoning ordinance had effected a taking. The plaintiff purchased the land involved in 1965, at which time the zoning designation permitted construction of a "district shopping center" which the plaintiff planned to build. The 1973 zoning ordinance rezoned plaintiff's 20 acres into four different zoning classifications: commercial, residential, transit station, and greenway. In discussing the taking challenge in dicta the court divided the property analytically into two separate parcels: (1) those classified commercial or residential, and (2) those classified greenway or transit station. As to the first, no taking was found since substantial beneficial uses were permitted. As to the second, the court did state that a cause of action for inverse condemnation could be maintained.

In the case before us it is clear that the Hillside Ordinance prevents any development whatsoever on the largest parcel of Corrigan's land. This is a taking. Consistent with the conclusion that a taking occurred upon enactment of the Hillside Ordinance is the appraisal testimony. Robert Blake, an appraiser with 36 years experience, testified on behalf of Corrigan. As of November, 1980 [8] Blake valued Corrigan's property as follows:

(1) assuming R-1-35 zoning—the mountains at $4,500 per acre and the lowlands at $7,000 per acre, and (2) assuming the Hillside Ordinance zoning—the *mountains at no value* and lowlands at $8,000 per acre. [9] Thus, Corrigan's property was worth $31,365,500 prior to enactment of the ordinance and $17,728,000 under the ordinance. [10]

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[8] Blake testified that the corresponding November, 1977 values would be one third less than the December, 1980 values.

[9] Blake assumed a minimum density of 2.7 and a maximum of 3.2 dwelling units per acre in the lowlands with the density transfer.

[10] See note 12 *infra*.

Wendell Montandon, an appraiser with nine years experience, testified on behalf of the City of Scottsdale. Montandon's testimony which we summarize, relates to the value of Corrigan's property as of December 1980: (1) assuming R-1-35 zoning—the mountains at $1,250 per acre [11] and the lowlands at $10,000 per acre, and (2) assuming the Hillside Ordinance zoning—the *mountains at no value* and the lowlands at $12,000 to $13,000 per acre. [12] Thus, Montandon concluded that Corrigan's property would be worth $26,563,750 zoned R-1-35 and approximately $27,500,000 to $28,808,000 under the Hillside ordinance. [13] But both appraisers in presenting their respective appraisals agreed the mountains would have no monetary value under this ordinance.

As noted in *Cardon Oil Co. v. City of Phoenix:*

> The principal constitutional test applied to zoning decisions is whether the zoning bears any substantial relation to the public health, safety, morals or general welfare. (citation omitted) When zoning power is used in such a way that the attempted regulation amounts to a "taking" of property, the zoning ordinance runs into direct conflict with A.R.S. Const. art 2, § 17, which prohibits government from taking private property without just compensation to the owners.

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[11] On the $1,250 value for mountain acreage Montandon assumed a 60% discount for an installment sale. Thus, the cash price for mountain land would have been $3,125 per acre.

[12] Montandon also testified that the corresponding November 1977 values would be: (1) assuming R-1-35 zoning—the mountains at $500 per acre and the lowlands at $4,000 per acre, and (2) assuming the Hillside Ordinance zoning—the mountains at no value and the lowlands at $4,400 to $4,800 per acre. Montandon calculated the $500 for mountain acreage assuming a 60% discount for an installment sale. Thus, the cash price for the mountains would be $1,250 per acre.

[13] These figures are based on the assumption that 3,523 acres are in the mountains (above the no development line) and 2,216 acres are in the lowlands.

122 Ariz. at 104, 593 P.2d at 658. If the rezoning renders the property useless it amounts to a confiscation without compensation, making the attempted rezoning void. *Id.*

In this opinion we have set forth an extended discussion of the applicable law in order to demonstrate the difficulties encountered in resolving the conflicting and yet legitimate interests between private rights and public concern. This resolution cannot be made in a vacuum. Rather it must be made in the total context of the case presented with all of these considerations in mind. The ordinance in question is particularly beguiling in that it attempts to achieve a laudable goal—preservation of the McDowell Mountains in their natural state—without apparent cost. However we conclude and therefore hold that the Hillside Ordinance is void as an unconstitutional taking of appellant's property without just compensation. In reaching this conclusion we have determined that the Hillside Ordinance is an invalid use of police power and therefore it constitutes a taking of property for which just compensation must be made as required by both the federal and state constitutions. Further, we hold that under Section 17, article 2 of the Arizona Constitution the transfer of density credits does not constitute just compensation for property taken by eminent domain. This provision of our state constitution requires compensation for such a taking to be made by payment of money in an amount that has been judicially determined. Ariz. Const. art. 2, Section 17. The transfer of density credits cannot meet this state constitutional requirement. We therefore reverse the judgment of the trial court. [14]

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[14] On motion, the trial court dismissed the count for money damages on the strength of the holding in *Davis v. Pima County*, 121 Ariz. 343, 590 P.2d 459 (App. 1978), *cert. denied*, 442 U.S. 942 (1979). Corrigan asks this court to reverse on the basis of the holding in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981). We do not read that case as requiring a different result than mandated by *Davis v. Pima County*. We therefore affirm the trial court as to the dismissal of the count for money damages.

/s/ SARAH D. GRANT
SARAH D. GRANT, Judge

CONCURRING:

/s/ J. THOMAS BROOKS
J. THOMAS BROOKS,
Judge

/s/ JOE W. CONTRERAS
JOE W. CONTRERAS, Judge

Opinion of Arizona Supreme Court

IN THE
SUPREME COURT OF
THE STATE OF ARIZONA
In Banc

JOYCE M. CORRIGAN, Plaintiff-Appellant, v. CITY OF SCOTTSDALE, a municipal corporation, Defendant-Appellee.	Supreme Court No. 18239-PR (Court of Appeals No. 1 CA-CIV 6300)

Appeal from the Superior Court of Maricopa County
Cause No. C-359908
The Honorable James Moeller, Judge
REMANDED

Opinion of the Court of Appeals,
Division One, filed 28 February 1985
Affirmed in Part
Vacated in Part

Fennemore, Craig, von Ammon, Udall & Powers By James Powers, Timothy Berg, and Jane Nicoetti-Jones Attorneys for Plaintiff-Appellant	Phoenix
William E. Farrell, Scottsdale City Attorney	Scottsdale
Schorr, Eldridge and Bangs By S. L. Schorr and Frank S. Bangs, Jr.	Tucson
Lewis & Roca By John P. Frank and Michael O. Miller Attorneys for Defendant-Appellee	Phoenix

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CAMERON, Justice

This is a petition for review of an opinion of the court of appeals, which reversed the trial court judgment in favor of the City of Scottsdale and declared its zoning ordinance void as an unconstitutional taking of Ms. Corrigan's property without just compensation. Corrigan v. City of Scottsdale, _____ Ariz. _____, _____ P.2d _____ [1 CA-CIV 6300, filed 28 Feb. 1985]. We have jurisdiction pursuant to art. 6 § 5(3) of the Arizona Constitution, A.R.S. § 12-120.24 and Rule 23, Ariz. R. Civ. App. Proc., 17A A.R.S.

The only issue to be decided on review is whether a landowner is entitled to money damages for a temporary taking of property by reason of an invalid zoning ordinance.

The facts follow. Ms. Corrigan owns 5,738 acres of undeveloped land, which is made up of three contiguous parcels. The largest parcel of land is approximately 4,800 acres; a smaller parcel of 608 acres adjoins the large parcel in a single point, at its northwest corner. A third parcel of approximately 330 acres connects with the large parcel, at the large parcel's southwest corner. All of this property is a part of, or close to, the McDowell Mountains. This land previously had been part of the D.C. Ranch, owned by Corrigan's father and E. E. Brown. Ms. Corrigan obtained her part of the property by purchase for two million dollars from Brown's children.

In 1963, the City of Scottsdale (city) annexed the southern part of the DC Ranch, including the land involved herein. The McDowell Mountains thus became the only hilly or mountainous terrain within the city limits. The land was zoned by the city as R-1-35 which allows one single family residence on a lot of at least 35,000 square feet.

Later in 1977, the city, in accordance with its earlier general use plans, added sections 6.800 through 6.807 to its zoning ordinance thus creating the Hillside District. This ordinance established two areas, the Hillside Conservation Area and the Hillside Development Area. The two areas are divided by a "no development" line. This line is located wherever one of the following conditions is first encountered:

unstable slopes subject to rolling rocks or landslides; bedrock areas; slopes of 15 percent or more; or shallow, rocky mountain soils subject to severe erosion. This line under certain conditions may be adjusted to where two of the enumerated conditions are present. The Conservation Area, which is all land above the "no development" line, is to be used solely for the conservation of open space with the land legally secured for such conservation by easement or dedication. The Development Area may be developed with some limitations, such as retaining a fixed minimum percentage of the land in its natural state. Finally, the ordinance provided density credits for the land in the Conservation Area which may be transferred to contiguous land in the Development Area. [1]

The Hillside District ordinance did not affect Ms. Corrigan's two smaller parcels of land; however, 3,836 acres or 80 percent of her 4,800 acre parcel is in the Conservation Area. Assuming that all possible adjustments in the "no development" line were made, 3,523 acres or 74 percent of this land would still remain in the Conservation Area.

Ms. Corrigan filed suit seeking a declaration that the ordinance was unconstitutional and further claiming money damages for the temporary taking of her property. Ms. Corrigan did not submit a development plan to the city either prior to or after filing the suit. The trial court entered findings of fact and conclusions of law that the ordinance was constitutional and that no taking of Ms. Corrigan's property had occurred. Accordingly, it dismissed the claim for damages.

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[1] Density credits are also known as transferable development rights. An ordinance, such as the one in this case, "provides that development which is prohibited on one parcel of land may instead be applied to other parcels, allowing these other parcels to be developed to a greater extent than zoning normally would allow." Note, The Transferability of Development Rights, 53 U.Colo.L.Rev. 165, 165 (1981). Thus, Ms. Corrigan may now build in the Development Area alone the same number of housing units that she could previously build before the ordinance in the Conservation and Development Areas combined. We express no opinion as to the legality or constitutionality of this scheme.

The court of appeals reversed, stating that an unconstitutional taking without just compensation of Ms. Corrigan's land had occurred under both the United States and Arizona Constitutions. Corrigan v. City of Scottsdale, slip op. at 27. Further, the appeals court held that the transfer of density credits could not constitute just compensation under the Arizona Constitution, as the Arizona Constitution requires payment of a judicially determined amount of money as compensation for such a taking. *Id.* Nevertheless, the appeals court upheld the dismissal by the trial court of the damages claim based on Davis v. Pima County, 121 Ariz. 343, 590 P.2d 459 (App. 1978), *cert. denied,* 442 U.S. 942, 99 S.Ct. 2885, 61 L.Ed.2d 312 (1979), which held that the sole remedy for confiscatory zoning is invalidation of the ordinance and not money damages. Slip op. at 27, n.14. This court granted Ms. Corrigan's petition for review to determine whether the remedy for a temporary unconstitutional taking of a person's property by virtue of a confiscatory zoning ordinance should be so limited.

SHOULD DAMAGES BE RECOVERABLE?

The issue of monetary damages for a regulatory "taking" of property without just compensation is not well settled in land use law. The United States Supreme Court has failed to decide this precise question on several occasions: Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981); Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, _____ U.S. _____, 105 S.Ct. 3108, _____ L.Ed.2d _____ (1985). In fact, at this writing, it is set to examine the issue once again. *See* MacDonald, Sommers & Frates v. County of Yolo [3 CIV 22306 Cal.Ct.App., 3d Dist. unpublished opinion filed 24 January 1985], *cert. granted,* 54 U.S.L.W. 3263 (21 October 1985, No. 84-2015). As there is no definitive interpretation on this issue under the Fifth Amendment of the United States Constitution, we will rely on the Arizona Constitution. A state constitutional analysis of this question is not unusual, *see* Burrows v. City

of Keene, 121 N.H. 590, 432 A.2d 15, 22 (1981), and is quite appropriate in light of our unique constitutional provision.

Article 2 § 17 of the Arizona Constitution provides in part:

> No private property shall be taken or damaged for public or private use without just compensation having first been made . . .
>
> [and] until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury . . . .

This provision, like the Fifth Amendment, prohibits a taking of property without just compensation but unlike the Fifth Amendment, specifically requires compensation for a taking to be made by a payment of money in a judicially determined amount. In the instant case, the court of appeals held and we agree that the Hillside Ordinance does "constitute a taking of property for which just compensation must be made." Corrigan v. City of Scottsdale, slip op. at 27. Thus the next step, under the Arizona Constitution, should logically be the imposition of money damages. Nevertheless, the appeals court unheld the trial court's dismissal of the money damages claim based on Davis v. Pima County, *supra*.

In *Davis*, the court of appeals stated:

> When a zoning ordinance is confiscatory it results in a "taking of the property and is, in effect, the exercise of the power of eminent domain."
>
> * * *
>
> However, *though appellants established a "taking" if the board's action were not undone,* this does not mean they are entitled to money damages. * * * The proper remedy when zoning is confiscatory is either to seek by declaratory judgment to invalidate the general zoning ordinance or to challenge the particular rezoning determination by means of a special action.

121 Ariz. at 345, 590 P.2d at 461. (emphasis added) (citations omitted). We do not agree. Admittedly, a zoning body should not have its ordinance invalidated and then have to pay full fair market value condemnation type damages based on a permanent taking. "[N]othing in the Just Compensation Clause empowers a court to order a government entity to condemn the property and pay its full fair market value, where the "taking" already effected is temporary and reversible . . . ." San Diego Gas & Electric v. City of San Diego, 450 U.S. at 659, 101 S.Ct. at 1307, (BRENNAN, J., dissenting). However, once an unconstitutional taking is shown, a person should receive damages for the time in which the confiscatory zoning ordinance has "taken the property", that is the time between the taking and the invalidation of the ordinance.

> [O]nce a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

San Diego Gas & Electric v. City of San Diego, 450 U.S. at 654, 101 S.Ct. at 1305 (BRENNAN, J., dissenting) (citations and footnotes omitted). We believe that once a taking is found, the Arizona Constitution mandates the payment of money as damages for any injury suffered. Ariz. Const., art. 2 § 17. We agree with the simple logic expressed by Justice Brennan in his San Diego Gas & Electric v. City of San Diego dissent:

> Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.
>
> * * *
>
> If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of

> benefits received during the interim period between application of the regulation and the government entity's recission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.

450 U.S. at 656-57, 101 S.Ct. at 1306, (BRENNAN, J., dissenting) (citations and footnotes omitted).

We are not alone in holding that a landowner may recover damages for a temporary taking by zoning. In a case where the plaintiff-landowner's Waterway Development Permit application was denied because the city "sought to impose a servitude upon the property to preserve 'the natural and traditional character of the land and waterway' ", the Texas Supreme Court stated, "[t]here was no suggestion that government may take or hold another's property without paying for it, just because the land is pretty. Our conclusion is that the City of Austin was liable in damages to the plaintiffs." City of Austin v. Teague, 570 S.W.2d 389, 394 (Tx. 1978).

In New Jersey, it has been flatly held that "[t]emporary takings are compensable." Sheerr v. Township of Evesham, 184 N.J. Super.11, 445 A.2d 46, 73 (1982).

In a case where the City of Lincoln zoned the plaintiff's land for public use and clearly intended to use the land for a school and other government buildings, the North Dakota Supreme Court stated:

> We believe [the compensation remedy proposed by Justice Brennan] for cases involving a regulatory taking constitutes not only a legally correct analysis of the "taking" involved but also provides a practical and fair solution for all parties. If a landowner proves that governmental regulation has deprived him of all reasonable use of his property, he is entitled to receive just compensation.

Rippley v. City of Lincoln, 330 N.W.2d 505, 511 (N.D. 1983).

More significantly, in a case very similar to the one before us the New Hampshire Supreme Court not only allowed damages for a temporary taking but also reasonable attorneys fees and double costs. Burrows v. City of Keene, 121 N.H. at 601-602, 432 A.2d at 22. In *Burrows*, the city not only failed to approve the plaintiff's subdivision plans but further, as in this case, zoned 109 acres of the plaintiff's land into the conservation area. 121 N.H. at 595, 432 A.2d at 17. The court rejected cases like Agins v. Tiburon, *supra*, and Davis v. Pima County, *supra*, which limit a landowner to invalidation by stating:

> [T]he owner's property has been taken during the interim period and he is entitled to compensation for that taking. Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying "progress" upon individual landowners rather than the public at large. The allowance of damages ... during the period of the taking, however, should encourage such officials to stay well on the constitutional side of the line, ...

Burrows v. City of Keene, 121 N.H. at 599, 432 A.2d at 20 (citations omitted).

We note that the reasons generally given for denying damages are that: (1) it usurps a legislative function; (2) it threatens substantial fiscal liability on local governments; and (3) it would inhibit governmental land planning. Note, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. Rev. 711, 725 (1982). *See also* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. 612, 643-644 (1983). We believe these reasons do not justify such a rule.

First, since zoning is an exercise of the police power, it is often deemed a legislative function. Davis v. Pima County, 121 Ariz. at 345, 590 P.2d at 461; Note, *supra* at 725. Thus some argue that the awarding of damages deprives the legis-

lative body of being the one to decide whether the regulation is appropriate in light of the fact that compensation will be paid. Such an argument misses the point. No legislative prerogative is usurped by awarding damages for the time the property was temporarily taken under an invalid zoning ordinance. The regulating body can still weigh all the relevant considerations and determine for itself how best to effectuate its policy in the future. The same alternatives are open to them after a remedy of invalidation plus temporary damages as exist after invalidation alone. The legislative body may pay to acquire the land outright, agree to pay the landowner a certain amount in order to continue the regulation, or simply abandon the regulation altogether. All that is added by an award of temporary damages is that the landowner is compensated for losses that he has already suffered by virtue of the unconstitutional taking. *See* San Diego Gas & Elec. v. City of San Diego, 450 U.S. at 656-657, 101 S.Ct. at 1306; Note, *supra* at 725-729.

Second, fears of fiscal liability did not stop courts from limiting or abolishing municipal sovereign immunity and likewise should not bar a person's constitutionally guaranteed compensation for the impermissible taking of his property. *Id.* at 726-727. Further, fiscal liability may be an incentive for responsible public planning. In this we note that a local government will not be liable for any substantial liability unless it irresponsibly imposed staggering losses onto a private citizen by its land regulation. D. Hagman, *Temporary Or Interim Damages Awards In Land Use Control Cases,* in *1982 Zoning and Planning Law Handbook* 201 (F.Strom.ed. 1982) (also found in Zoning & Plan.L.Rep. v. 4, n.6 (June 1981)).

Finally, we do not believe that advocating responsible governmental planning is the same thing as inhibiting governmental planning. Public officials should consider their actions before enacting them. Mere invalidation does not provide any incentive for public planners not to experiment at an individual property owner's expense. Neither does in-

validation provide any deterrent impact; instead the city can and often does enact another similarly restrictive regulation and force the landowner to undergo another costly litigation battle. [2] Without a damages remedy, invalidation alone is a toothless tiger "capable of great roars about constitutional property rights but ineffectual in guarding against even obvious excesses resulting from multiple regulation." Note, *supra* at 734.

The policy reasons in favor of denying damages are not persuasive. Governmental entities should be as mindful of a person's constitutional rights as anyone else. Therefore, under our constitutional provision requiring a payment of money for an unconstitutional taking of a person's property, we

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[2] We borrow a portion of a footnote from Justice Brennan's dissent in San Diego Gas & Elec. v. City of San Diego because of its obvious relevance:

> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:
>
> "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.
>
> "If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of Selby v. City of San Buenaventura, 10 C.3d 110, [109 Cal.Rptr. 799, 514 P.2d 111] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> * * *
>
> "See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good Luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original).

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. at 656, n.22, 101 S.Ct. at 1306, n.22 (BRENNAN, J., dissenting).

hold that invalidation is not the sole remedy, and the landowner is entitled to money damages from the time the regulation was protested or challenged. Statements in *Davis* which prohibit any recovery of money damages for a regulatory taking, by a confiscatory zoning ordinance, are overruled.

THE PROPER MEASURE OF DAMAGES

Having determined that money damages are recoverable for a temporary taking by reason of an invalid zoning ordinance under art. 2 § 17 of the Arizona Constitution, we must now determine how those damages should properly be measured.

There has been extensive legal writing on the subject of how damages should be measured for a temporary taking. *See generally* D. Hagman & D. Misczynski, *Windfalls for Wipeouts* (1978); Johnson, *Compensation for Invalid Land-Use Regulations,* 15 Ga. L. Rev. 559 (1981); D. Hagman, *Temporary Or Interim Damages Awards In Land Use Control Cases, supra;* Wright, *Damages or Compensation for Unconstitutional Land Use Regulations, supra.* From these and many other writings have emerged "five basic rules for measuring damages: rental return, option price, interest on lost profit, before-after valuation (two alternatives), and benefit to the government." D. Hagman, *Temporary or Interim Damages Awards in Land Use Control Cases* in *1982 Zoning & Planning Law Handbook* at 218-227.

Each of these damage measures works well in some "taking" cases and inequitably, if at all, in others. This is because no one rule adequately fits each of the many factual situations that may be present in a particular case. Such problems as: whether the losses are speculative; when the taking actually occurred; whether it caused any damage; and whether it was an acquisitory or nonacquisitory setting combine to make each measure of damages, in some cases, a "guessing game" between too little compensation on the one hand and providing a windfall on the other.

Recognizing this problem, we feel the best approach is not to require the application of any particular damage rule to all temporary taking cases. Instead we hold that the proper measure of damages in a particular case is an issue to be decided on the facts of each individual case. It is our intent to compensate a person for the losses he has actually suffered by virtue of the taking. Either the parties may agree to an appropriate damage measure or each may present evidence as to the actual damages in the case and its correct method of determination. The damages awarded and the way to measure those damages thus may be adapted to compensate the party whose land has been taken for his actual losses.

We emphasize, however, that no matter what measure of damages is appropriate in a given case, the award must only be for *actual damages*. Such actual damages must be provable to a reasonable certainty similar to common law tort damages. *See* Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). This approach will compensate for losses actually suffered while avoiding the threat of windfalls to plaintiffs at the expense of substantial government liability. Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. at 637-39; City of Austin v. Teague, 570 S.W.2d at 395. In adopting this approach we agree with Professor Wright that:

> Most of the policy arguments in opposition to compensation or damages for regulatory takings are premised on the fear that Draconian liability on local governments will result. However, limiting recovery to a landowner's actual losses where the regulatory taking is temporary should help eliminate the threat of such burdensome liability. This approach adequately balances the public interest against private interests by requiring compensation for regulatory takings while limiting that compensation to actual losses for temporary takings. Such a balance between public and private interests will not be achieved by the extreme approach of denying all compensation for regulatory takings and limiting landowners to injunctive and declaratory relief.

Wright, *Damages or Compensation for Unconstitutional Land Use Regulations*, 37 Ark. L. Rev. at 645.

Applying this principle of compensation for actual loss caused by a temporary taking to the present case reveals an insufficient record on the damages issue. The evidence of damages presented to the trial court was not focused on what actual losses, if any, were suffered by Ms. Corrigan. *See Id.* at 638, (an owner with no plans for undeveloped property at the time of the regulatory taking may have difficulty proving actual damages).[3] However, we cannot fault counsel for their failure to predict our ruling on this issue. We, therefore, remand this matter to the trial court for a determination as to the proper measure of damages in accordance with this opinion.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

NOTE: Justice Stanley G. Feldman did not participate in the determination of this matter.

[3] It is not surprising that Corrigan had no plan of development. As long as the property was "zoned" in the Conservation Area, there was no reasonable hope that anyone would purchase the property, even if there were a plan of development.

November 14, 1985 Arizona Supreme Court
Order denying
City of Scottsdale's Petition for Review

IN THE
SUPREME COURT OF
THE STATE OF ARIZONA
In Banc

JOYCE M. CORRIGAN, Plaintiff-Appellant, v. CITY OF SCOTTSDALE, a municipal corporation, Defendant-Appellee.	Supreme Court No. 18239-PR (Court of Appeals No. 1 CA-CIV 6300)

Appeal from the Superior Court of Maricopa County
Cause No. C-359908
The Honorable James Moeller, Judge

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 13, 1985, in regard to the above-referenced cause:

"ORDERED: Granting Appellant's Corrigan Petition for Review and Denying Respondent City of Scottsdale's Petition for Review.

Justice Feldman did not participate in the determination of this matter."

Petitioner's [Appellant Corrigan] filing fee in the amount of $25.00 should be remitted within fifteen days.

The Clerk of the Court of Appeals, Division One, shall forward the record to the Clerk of the Supreme Court.

DAVID R. COLE, Clerk

TO:

James Powers, Esq., Fennemore, Craig, von Ammon, Udall & Powers
Timothy Berg, Esq., Fennemore, Craig, von Ammon, Udall & Powers

Jane Nicoletti-Jones, Esq., Fennemore, Craig, von Ammon, Udall & Powers
William Farrell, Esq., Scottsdale City Attorney, Attn: Donald O. Loeb, Esq.
S. L. Schorr, Esq., Schorr, Eldridge & Bangs, P.C.
Frank Bangs, Jr., Esq., Schorr, Eldridge & Bangs, P.C.
Hon. James Moeller, Judge, Maricopa County Superior Court
Glen D. Clark, Clerk, Court of Appeals, Division One
Vivian Kringle, Clerk, Maricopa County Superior Court

November 14, 1985

July 16, 1986 Arizona Supreme Court
Order denying
City of Scottsdale's Motion for Reconsideration

IN THE
SUPREME COURT OF
THE STATE OF ARIZONA
In Banc

JOYCE M. CORRIGAN, Plaintiff-Appellant, v. CITY OF SCOTTSDALE, a municipal corporation, Defendant-Appellee.	Supreme Court No. 18239-PR (Court of Appeals No. 1 CA-CIV 6300)

Appeal from the Superior Court of Maricopa County
Cause No. C-359908
The Honorable James Moeller, Judge

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 15, 1986, in regard to the above-referenced cause:

"ORDERED: Motion for Reconsideration = DENIED.

Justice Feldman did not participate in the determination of this matter."

DAVID R. COLE, Clerk

TO:

James Powers, Esq., Timothy Berg, Esq., and Jane Nicoletti-Jones, Esq., Fennemore, Craig, von Ammon, Udall & Powers
William E. Farrell, Scottsdale City Attorney - Attn: Donald O. Loeb, Esq.
S. L. Schorr, Esq., and Frank S. Bangs, Jr., Esq., Winston & Strawn
John P. Frank, Esq., and Michael O. Miller, Esq., Lewis and Roca.

July 16, 1986

Scottsdale, Az., Zoning Ordinance
§§ 6.800-.807(1977)
(Hillside Ordinance)

Section 6.800 **(HC or HD) Hillside District**

Section 6.801 **Purpose**

The purpose of this district is to conserve the McDowell Mountains and protect their surrounding hillsides. The Hillside District is intended to:

A. Preserve the natural character and aesthetic value of the McDowell Mountains;

B. Protect people and property from potentially hazardous conditions particular to mountains and hillsides;

C. Accommodate development on the hillsides while protecting the area's natural character, resources and aesthetic value.

D. Encourage innovative hillside development by allowing the flexibility necessary to produce unique, environmentally sensitive projects;

E. Minimize hillside disturbance and potential problems such as construction scars, erosion, increased runoff and downstream flood hazards.

F. Minimize the costs to the City of providing public services and facilities to developable hillside areas and prevent development where public services and facilities cannot be feasibly provided.

Section 6.6802 **Definition**

A. The Hillside District shall include the McDowell Mountains and their surrounding hillsides. This district shall be superimposed over all other underlying zoning districts. The Hillside District shall contain two major parts: The mountains shall be designated as "Hillside Conservation Area (HC)" and their surrounding hillsides as "Hillside Development Area (HD)." These two areas shall be separated by a "no development" line, which is determined by the occurrence of any one of the following conditions that define the mountains:

1. Unstable slopes subject to boulder rolling, rockfalls, landslides;
2. Bedrock areas;
3. Slopes of 15 percent or greater;
4. Shallow, rocky mountain soils subject to severe erosion.

B. Within the Hillside Conservation area (HC) the land shall be set aside for the conservation of permanent natural open space.

C. The Hillside Development area (HD) is established to protect the hillsides while accommodate development, subject to the special provisions and standards of this district.

Section 6.6803 **Approvals required**

The structure or building shall be built or remodeled upon land in the Hillside District until:

A. Rezoning has been approved for any proposed development which may achieve the higher densities made available through density credit transfer.

B. Development Review Board approval has been obtained as outlined in Article 1, Section 1.400 and in conformance with the provisions of Section 6.6807 of this district, except that single family detached units which are not clustered shall require approval as outlined in "C" below.

C. Site development approval has been obtained for all non-clustered single family detached dwelling units. Site development shall be approved by the Planning Department as delegated by the Development Review Board, and shall consider only those criteria in Section 6.6807 of this district. Site development approval administration shall be the same as that outlined in Article 1, Section 1.405. The Planning Department's decision may be appealed to the Development Review Board.

Section 6.6804 **Application requirements**

All applications shall consist of the following materials:

A. **A development program including:**

1. A legal description of the property boundary, and where applicable, of the "no development" line;
2. Size of the area;
3. The nature of development proposed;
4. The overall residential density and nonresidential floor space proposed;
5. The anticipated acreage, residential density, nonresidential floor space and timing for each unit of the property proposed to be developed separately.

B. A development plan which shall consist of a map or maps drawn to a scale of one inch equals 100 feet or less, showing at least the following:

1. The boundary of the proposed development, and where applicable, accurately delineating the "no development" line of Hillside Conservation area (HC), using the criteria set forth under Section 6.802.
2. The topographic character of the land, showing contour lines at an interval of not more than two feet for areas proposed to be developed, and not more than 10 feet for the remainder of the property.
3. Existing natural drainage system and proposed drainage accommodations.
4. Open space designations, including delineation of all areas to remain in a natural state. All areas used to meet the required natural area requirements of Section 6.807 A.1.a shall be designated as natural area easements.
5. The location and configuration of all vehiclular [sic] circulation and parking areas, pedestrian, equestrian and bikeway trail systems.

6. The location and configuration of different types of buildings and structures and parts of any buildings such as walls, fences, et cetera. (Not required for subdivision applications).

C. **Vegetation and revegetation information, including:**

1. Data and aerial maps showing the location, type and nature of existing major vegetation, including at least the following:

a. Significant stands, clusters or contiguous areas of dense growth;

b. The existing vegetation to be preserved.

2. A map showing areas to be graded and a general description of how exposed areas of grading will be treated to minimize erosion and visual scarring. (Subdividers shall only include subdivision-related grading).

D. All conditions agreed to in public hearing by the applicant which are not included in the formal application.

E. Where certain provisions or requirements of the Hillside District do not pertain to a subdivider, the subdivider shall be responsible for conveying on the final plat any such provision or requirements which must be complied with by the ultimate developer of the land.

Section 6.805 **Additional material**

The following additional material and information shall be provided for all properties, except parcels of two and a half acres or less recorded prior to the effective date of this ordinance, or any proposal for an individual dwelling unit.

A. Soils and geology reports, prepared by a qualified professional, including data and maps drawn to a scale of one inch equals 100 feet or less, containing at least the following information:

1. Soils: type, nature and distribution of existing soils, based on uniform procedures and soil classifications used by the U.S. Soil Conservation Service.

2. Geology: Geologic characteristics of the site, including landforms, relief, depth to bedrock and excavation conditions. Areas of unstable slopes, bedrock areas or rock outcroppings and slopes of 15 percent or greater shall be delineated.

   Conclusions and recommendations regarding the effect of the site's soil and geologic conditions on the proposed development shall be included.

B. **Visual analysis, including at least the following:**

1. View-site analysis indicating surrounding vistas to and from the hillsides, prominent visual landforms and vista corridors to the mountains.

2. A map and plan showing visual features of the landscape to be preserved and methods which will be used to ensure aesthetic compatibility of the proposed development.

3. Drawings and narrative which explain how roadways will be constructed in a manner compatible with the natural terrain and with scarring eliminated at completion of construction.

4. Location and configuration of buildings, sufficiently detailed to indicate the relationship between structures and site with no scarring visible at completion of construction. (Not required for subdivision applications).

C. **Grading plan, including at least the following information:**

(Subdividers shall only include subdivision-related grading)

1. Dimensions, elevations and finish contours to be achieved by all grading, including cut and fill slopes and drainage-related construction.

2. A description of the methods to be employed in disposing or relocating of soil and other material that is removed during grading.

3. A schedule showing each stage of grading, including the total area of soil surface to be disturbed during each stage.

D. **Landscape information, including the materials required under Sec. 6.804, C, as well as the following:**

1. Data and aerial maps showing at least the following:

   a. Ironwood, mesquite, palo verde and saguaro of four inch caliper or greater; and

   b. The identification of existing vegetation which cannot be preserved in its natural location, but is to be relocated on the site.

2. The design, location and type of landscaping to be used in returning all exposed areas of grading to a state which visually blends with the surrounding desert environment, EXCEPT that this requirement does not apply to areas within lots intended for unclustered single-family dwelling units. (For subdivisions, this requirement applies only to those areas exposed by subdivision-related grading).

3. The type of landscaping to be used within public easements or areas to be dedicated to the City and description of irrigation methods to reestablish vegetation.

4. Location of the open space network, including designated vista corridors.

E. The applicant must be able to visually communicate the proposed development and its relationship to the hillside areas after all construction is completed, including such methods as:

1. Accurate perspective renderins [sic].

2. Three-dimensional scale models.

Section 6.806 **Hillside Conservation Area (HC)**

A. **General provisions**

1. Although development shall not be allowed in the Hillside Conservation area, density credit may be transferred to adjacent Hillside Development land contained within the application, subject to:
   a. Density credit derived from existing underlying zoning in the HC area, at the following rates:
      (1) R1-43: 0.8 units per acre
      (2) R1-35: 1.0 units per acre
   b. Regulations of this ordinance and other applicable City ordinances which will apply to development in the HD area;
   c. Density limitations of the zoning in the HD area as ultimately approved by the City Council:
   d. The ownership pattern on record on October 8, 1977, the date of the public notice of the zoning ordinance amendment to establish the Hillside District.
2. Rezoning of the HD area to achieve the higher densities made available through density credit transfer shall result in removal of the underlying zoning in the JC area.
3. The land within the Hillside Conservation area shall be legally secured for the conservation of permanent natural open space through easements or dedication.
4. No grading, filling, clearing or excavation of any kind shall be allowed in the Hillside Conservation area.

B. **Permitted uses**

Buildings, structures or the placement of any impermeable surface shall not be permitted within the boundaries of the Hillside Conservation area. Uses al-

lowed shall be limited to those compatible with the conservation of natural open space, as approved by the City Council.

C. **"No development" line adjustment procedure**

If the applicant wishes to propose an adjustment to the "no development" line delineating the Hillside Conservation area (HC) as set forth under Section 6.802, the following shall apply:

1. Additional written and graphic material shall be prepared to accompany the application, which:
   a. Illustrates the conditions that the modification will produce, and
   b. Demonstrates the precautions which will be taken to solve potential problems and preserve the aesthetic value of the mountains.

* 2. The Development Review Board may deny or limit such proposed adjustments, in order to best achieve the purpose of the Hillside District, as set forth under Section 6.801 except that in no case shall the Conservation Area (HC) be required to be more than eighty (80) percent of any land held in single common ownership that existed on October 8, 1977.

* 3. The Hillside Development Area (HD) shall not be extended to include areas which contain three (3) or more of the factors which define the mountains, except that in no case shall the Conservation Area (HC) be required to be more than eighty (80) percent of any land held in single common ownership that existed on October 8, 1977.

Section 6.807 **Hillside Development Area (HD)**

All development of land in the Hillside Development area shall be regulated by the provisions of this section and the requirements of the underlying zoning district, except that in

the event of conflict, the provisions of the Hillside District shall prevail.

A. **Design criteria and development standards**

1. **Natural areas**

All development proposals shall include a portion of the site within the Hillside Development Area which is to be retained in a natural state.

a. The percent of the total site required to be retained in a natural state shall be based on the average slope of the land surface. A land slopes map kept on file in the Planning Program shall be used as the basis for slope determination. The following natural area requirements shall apply:

Slope Unit	Percent slope	Minimum % to remain as natural area
I	0 - 2	20
II	2 - 5	25
III	5 - 10	35
IV	10 - 15	50

The natural area requirement for each slope category shall be fulfilled with the area of that land slope.

b. The following shall be used as guidelines in locating natural areas:

(1) Contiguous areas along drainage channels;

(2) Ten foot minimum widths adjacent to roadways;

(3) Areas contiguous with other natural areas of adjacent properties;

(4) Areas containing rock outcroppings;

(5) Areas containing soils with high permeability;

(6) Significant stands or clusters of native vegetation, including such species as ironwood, palo verde, mesquite and saguaro;

(7) Known or discovered archaeological sites.

c. Natural area designations may apply toward the open space requirements of the underlying zoning district.

d. No grading, excavation or construction shall be allowed within areas designated as 'natural areas'.

e. All natural areas shall be legally secured by natural area easements prior to the issuance of building permits.

2. **Landscaping/open space**

a. Existing vegetation shall be retained in any part of the total development which is not designated for grading or construction.

b. Existing vegetation which cannot be preserved in place but is suitable for transplanting shall be relocated on the site.

c. Unimproved disturbed areas shall be landscaped within 180 days following issuance of a grading permit and/or within 30 days of the issuance of a certificate of occupancy, or utility 'turn-on'.

d. All required plans for landscaping shall be approved prior to issuance of building permit, and all installations shall be in accordance with the approved landscape plan.

e. All landscaping within public easements or areas to be dedicated to the City shall be low maintenance, low water consumptive desert vegetation.

f. The following species of four-inch caliper or greater shall be preserved wherever possible: ironwood, mesquite, palo verde and saguaro.

g. An open space network shall be designed to provide contiguous linkages throughout the development parcel, and between adjacent parcels where major public trail systems or vista corridors are designated.

h. Designated vista corridors shall be a minimum width that includes the drainage easement and an additional 50-foot setback on both sides of the channel's drainage easement. The width of a vista corridor shall not be required to be greater than 200 feet. Buildings, walls or fences shall not be permitted within the vista corridors.

3. **Grading**

a. Man-made slopes shall conform to patterns of the natural terrain.

b. All cut and fill slopes shall be landscaped and shall be stabilized to control erosion.

c. Any cut or fill slope which is to be revegetated shall not be steeper than a 3:1 slope.

d. The maximum vertical dimension of any cut or fill shall be four feet, EXCEPT where the building shields the cut from view, the maximum vertical dimension of any cut shall be eight feet.

e. All excess excavated material shall be removed or otherwise placed so as to become an integral part of the site development.

f. During construction, measures such as sediment traps or terracing shall be used around all graded areas to minimize erosion.

g. Whenever archaeological sites are discovered during excavation, the Planning Department shall be notified and mutually agreeable precautions taken to preserve the artifacts.

4. **Aesthetics** (Not relevant to subdivisions)

   a. All mechanical equipment, including but not limited to air conditioning and pool equipment, shall not be visible from outside the property.

   b. All lighting shall be low scale and low intensity and directed downward and away from the view of others, as set forth in Article 5, Section 5.106.

5. **Roadways/circulation**

   a. Road alignments, driveways and parking areas shall conform as closely as possible to natural topography.

   b. Existing vegetation shall be preserved to the greatest extent possible in the location of roads and shall be retained as medians or buffers wherever possible within the unimproved right-of-way.

   c. Variations in road design and construction may be permitted in order to keep grading and cut slopes to a minimum.

   d. One-way loop roads may be constructed where appropriate for the terrain.

   e. Combinations of collective private driveways, cluster parking areas and off-street parking bays are encouraged in order to minimize paved areas.

6. **Fire protection**

   Prior to Development Review approval, the Fire Chief shall inspect the site to identify any unique conditions that may require special fire prevention precautions, and shall communicate the findings and recommendations to the Development Review Board.

B. **Cluster housing incentive**

A density bonus shall be allowed for cluster housing projects where the underlying zoning is an R-1, single-family residential district. In order to receive the bonus, the approved plan must contain 20 percent more natural area than the site requires under Section 6.807 A.1.a.

The maximum density allowed shall not exceed the density that is set forth as follows:

Zone	Maximum DU per gross acre
R1-7	5.5
R1-10	4.0
R1-18	2.4
R1-35	1.2
R1-43	1.0

C. **Modification procedure**

If the applicant wishes to propose a modification to the design criteria and development standards of this section or of the underlying zoning district, additional written and graphic material shall be prepared to accompany the application. The materials shall illustrate the conditions that the modified standards will produce. The material shall enable the Development Review Board to make the determination that the modification will produce a living environment, landscape quality and lifestyle equal to or superior to that produced by the existing design criteria and development standards.

Superior Court, County of Maricopa
Findings of Fact and Conclusions of Law
October 5, 1981

IN THE
SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE
COUNTY OF MARICOPA

JOYCE C. CORRIGAN,

Plaintiff,

vs.

CITY OF SCOTTSDALE, A MUNICIPAL CORPORATION,

Defendant.

NO. C 359908

FINDINGS OF FACT
CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Prior to 1963 E. E. Brown and Kemper Marley were equal partners in a ranching business known as the D C Ranch, then consisting of some 18,000 acres of fee land together with grazing leases on a substantial acreage of adjoining state lands. The ranch lay to the north and entirely outside the corporate boundaries of Scottsdale.

2. In the early 1960's Scottsdale city officials attempted to annex a large area north of the then-existing city limits and they asked the partners of the D C Ranch to subscribe to an annexation petition. The partners agreed to such a petition. The subject property was thereupon annexed into the City of Scottsdale along with a large area of other undeveloped property lying north of the inhabited part of the City.

3. Before its annexation by Scottsdale, the property was classified under the zoning ordinance of Maricopa County as R2-DR (Residence-2, Density-Rural). Under the Residence-2 classification the property could, if otherwise suitable, be legally used for single family dwellings, guest ranches and resort hotels, among other things.

4. Upon its annexation by Scottsdale the property was zoned R1-35, a classification that requires a single residence on lots containing at least 35,000 square feet.

5. After the death of E.E. Brown in 1966, his surviving widow was awarded a one-half community interest in Brown's partnership interest in the D C Ranch partnership. Plaintiff, who is the daughter of the other Partner, Kemper Marley, then purchased from the children of E.E. Brown their interest in his estate, including its undisclosed indebtedness and a one-quarter interest in the partnership. The purchase price was in excess of $2,000,000.

6. The D C Ranch partnership was then dissolved and its land partitioned, with the estate of E.E. Brown being awarded approximately one-quarter of the ranch lands, including the property involved in this case. On December 18, 1973 a decree of distribution was entered in the proceedings for the probate of the estate of E.E. Brown distributing this property to the plaintiff as assignee of the children of E.E. Brown.

7. The zoning ordinance of the City of Scottsdale was amended on November 15, 1977 by adding Sections 6.800 through 6.807, adopting provisions for a Hillside District. Section 6.806C of that ordinance was further amended in July of 1979.

8. The Hillside District generally encompassed those portions of the McDowell Mountains lying within the City of Scottsdale together with the lower lying approaches to the mountains. The Hillside District is divided into two different areas by what is referred to in the ordinance as the "no-development" line. The McDowell Mountains are above the no-development line and constitute what the ordinance refers to as the "Hillside Conservation" area. In addition to prohibiting any building in the Hillside Conservation area, the ordinance requires that from 20% to 50% of the land in the Hillside Development area be left in its natural state, depending upon the degree of slope from 0% to 15%.

9. Under the ordinance, the no-development line is initially to be drawn when any one of the four criteria, set forth in the ordinance, is first encountered. They are:

(1) Unstable slopes subject to boulder rolling, rock falls, landslides;

(2) Bedrock areas;

(3) Slopes of 15% or greater;

(4) Shallow rocky mountain soil subject to severe erosion. The ordinance contains an adjustment procedure whereby an applicant for approval of a development project may obtain an adjustment of the no-development line so as to push it to the point where two of these factors are encountered. The granting of such an adjustment is within the discretion of a development review board.

The purpose of the four criteria listed in the ordinance is to define areas which are generally perceived to constitute "mountains."

10. At the time of the adoption of the Hillside District amendment, the plaintiff owned approximately 5,738 acres lying within the district which had formerly been part of the D C Ranch. The property consisted of three parcels:

(a) A central block of 4,790 acres extending approximately five miles east and west at its longest dimension and extending two miles north and south at its widest.

(b) A complete section, Section 19, which touches the northwest corner of the central block. It is adjacent to the central block only in the sense that the two parcels touch at a single geometric point. Section 19 is smaller than a standard section and contains 608 acres.

(c) A parcel of 330 acres, representing the greater part of Section 31, which touches the southwest corner of the central block. This parcel also adjoins the central block only in the sense that the two parcels touch at a single geometric point.

11. The no-development line runs in a generally diagonally direction across the central block of the plaintiff's

property. It does not impinge on the other two parcels. Of the 4,790 acres contained in the central block approximately 3,836 acres, or 80%, lie above the no-development line. Under the adjustment procedure outlined in the ordinance, it is possible that the line could be moved by a review board so as to make several hundred additional acres available for development.

12. The Hillside Zoning Ordinance contains provisions under which the city council may permit the owner of property in the Hillside Conservation area to transfer the zoning density formerly available to those areas to adjacent land lying in the Hillside Development area. If the plaintiff were to make an application for such a density transfer, and if the city council should grant such a transfer, it would increase the available density on the lower lying lands to somewhere between 2.7 and 3.2 dwelling units per acre, depending upon the precise adjustment allowed in the no-development line.

13. The ordinance requires that "The land within the Hillside Conservation area shall be legally secured for the conservation of permanent natural open space through easements or dedication." It was the hope and intention of the proponents of this legislation that no person or combination of persons, including any future Scottsdale City Council, could ever authorize the development of such areas.

14. To allow development of plaintiff's entire parcel in accordance with the pre-existing zoning would result in public harm, although the evidence admittedly shows that no reasonable developer would seek to fully develop the entire parcel under the pre-existing zoning.

15. The restrictions imposed by the Hillside Zoning Ordinance result in a public benefit.

16. The enactment of the Hillside Zoning Ordinance does not adversely impact on the reasonable investment expectations of the use of the property.

17. Enactment of the Hillside Zoning Ordinance may well have enhanced the over-all value of plaintiff's property taken

as a whole; in any event, it is clear nothing approaching constitutionally protected destruction or diminution in use or value has occurred by reason of the enactment.

18. The ordinance is reasonably related to legitimate zoning considerations involving the public health, safety, and general welfare. It is reasonably related to aesthetic considerations and to the preservation and enjoyment of a unique geographic area.

19. Any diminution in value to the property as a whole that might otherwise have occurred by reason of the Hillside Zoning Ordinance had it been enacted without the density transfer provisions, is more than adequately made up for by the density transfer provisions of the ordinance.

20. The ordinance does not deny plaintiff the economically viable use of her land.

21. The ordinance restriction applies broadly to all property located within the mountainous areas of Scottsdale.

CONCLUSIONS OF LAW

1. The Court should not consider plaintiff's argument, raised for the first time following trial at final argument that the ordinance is not authorized by State statutes. If this issue is to be considered, it should be considered in a case in which the pleadings and evidence address the issue. It would be unfair to the defendant to consider this issue, injected into this case after trial, in this proceeding.

2. In determining the alleged unconstitutionality of the ordinance as applied to plaintiff's property, it is appropriate for the Court to consider the impact of the ordinance upon the property taken as a whole, rather than to look at individual portions thereof.

3. The enactment of zoning ordinances is a legislative function. As such, the motives of the city council, or individual members thereof, in enacting the ordinance are not a proper subject of judicial inquiry. Rather, the legal test to be applied to the ordinance is whether it is reasonably related to the public health, safety, and general welfare or whether it

exceeds legitimate zoning considerations and passes into the realm of condemnation.

4. There is only one plaintiff in this case. There have been no intervenors or other parties who have appeared. Accordingly, the Court's ruling can only address, and does only address, the impact of the ordinance on the plaintiff's piece of property.

5. The defendant City of Scottsdale could have restricted plaintiff's use of the property more drastically by other forms of zoning which have been constitutionally approved. The method selected by the City is a reasonable alternative to more severe types of zoning restrictions and results in less damage (if any) to the plaintiff's property than other forms which constitutionally could have been used.

6. There has been no "taking" of plaintiff's property within the meaning of the United States Constitution such as would require compensation.

7. There has been no "taking" or "damaging" of the property within the meaning of the Arizona Constitution such as would require compensation.

8. Having decided that there was no "taking" or "damaging" in the constitutional sense, it is unnecessary for the Court to determine whether a property owner who has been subject to a "taking" or "damaging" is limited in his remedies to seeking a declaration of unconstitutionality of the statute (as contended by defendant City) or may seek damages in the nature of inverse eminent domain (as contended by plaintiff).

9. The Scottsdale Hillside Zoning Ordinance is not unconstitutional on its face.

10. On the basis of the record presented, the Scottsdale Hillside Zoning Ordinance is not unconstitutional as applied to the plaintiff's property.

11. The question of whether the ordinance could be unconstitutionally applied to plaintiff's property administratively is not before the Court, since no plan relative to

the property has been submitted to the City for action. Such a determination could only come following exhaustion of administrative remedies.

12. The density transfer provisions are not unconstitutional as being a payment for a "taking" in other than dollars; instead, they are part of the ordinance itself which must be considered in determining the ordinance's impact upon the property. In this case, the density transfer provisions operate to prevent any unconstitutional "taking" or "damage" which might otherwise have occurred.

DONE IN OPEN COURT THIS 5TH DAY OF OCTOBER, 1981.

/s/ JAMES MOELLER
HONORABLE JAMES MOELLER

Supreme Court, U.S.
FILED
NOV 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-574

In The
Supreme Court of the United States

October Term, 1986

City of Scottsdale, a municipal corporation,
Petitioner,

v.

Joyce M. Corrigan,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS STATE OF ARIZONA

RESPONDENT'S BRIEF IN OPPOSITION

James Powers
FENNEMORE, CRAIG, von AMMON, UDALL & POWERS, P.C.
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
(602) 257-8700

Counsel for Respondent

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No. 86-574

In The
Supreme Court of the United States

October Term, 1986

City of Scottsdale, a municipal corporation,
Petitioner,

v.

Joyce M. Corrigan,
Respondent.

Respondent Joyce M. Corrigan respectfully requests that this Court deny the petition for a writ of certiorari to the Arizona Court of Appeals.

JURISDICTION

The Court lacks jurisdiction to review this case because:

1. The issues decided below were decided on adequate and independent state grounds. *See, e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935).

2. The petition is not timely. If it seeks review only of the taking issue it is too late; if it seeks review of the whole case it is premature. The judgment at which the petition purports to be directed is not a final judgment, and it decided a wholly different question than the one upon which review is now sought.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

In addition to the Fifth and Fourteenth Amendments to the United States Constitution and the Scottsdale Zoning Ordinance cited by the City, this case also involves Section

17 to Article 2 of the Arizona Constitution, which is reproduced in Appendix A to this brief.

REASONS FOR DENYING THE WRIT

I.

The Decision Below Rests Wholly on the Arizona Constitution.

The holding of the Arizona Court of Appeals, of which petitioner now seeks review by this Court, is represented by the following excerpt from its opinion:

> The ordinance in question is particularly beguiling in that it attempts to achieve a laudable goal—preservation of the McDowell Mountains in their natural state—without apparent cost. However we conclude and therefore hold that the Hillside Ordinance is void as an unconstitutional taking of appellant's property without just compensation. In reaching this conclusion we have determined that the Hillside Ordinance is an invalid use of police power and therefore it constitutes a taking of property for which just compensation must be made as required by both federal and state constitutions. Further, we hold that under Section 17, article 2 of the Arizona Constitution the transfer of density credits does not constitute just compensation for property taken by eminent domain. This provision of our state constitution requires compensation for such a taking to be made by payment of money in an amount that has been judicially determined. Ariz. Const. art. 2, Section 17. The transfer of density credits cannot meet this state constitutional requirement. We therefore reverse the judgment of the trial court.

(Petitioner's Appendix at 25a).

The issue raised now is whether that holding would be affected, one way or another, by a decision from this Court on the scope of the taking clause of the Fifth Amendment to the United States Constitution. A fair reading of the opinion of the Arizona Court of Appeals makes it clear that its holding would not be changed. The holding is wholly supported by the Arizona Constitution, especially Section 17 of

Article 2, and thus rests upon an adequate and independent state ground. *See, e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935).

If this Court should conclude that the state court was mistaken in placing any reliance at all on the federal Constitution, and that the enactment of this ordinance was not a taking under the Fifth Amendment, there is no ground for supposing that the state court would modify its interpretation of the quite different provisions in the Arizona Constitution. As a consequence, the petition here is no more than an invitation to this Court to write an essay on the taking clause of the Fifth Amendment, an essay that would have no effect on the outcome of the litigation. The Court should decline the invitation.

II.

The City's Petition Is Untimely.

In February of 1985, the Arizona Court of Appeals ruled that the Hillside Ordinance, prohibiting any disturbance of the natural terrain on more than 3,500 acres of the landowner's property, was invalid as an unconstitutional taking of that property. It declined, however, to hold that the landowner was entitled to damages for the period that the ordinance was in effect.

On November 14, 1985, the Arizona Supreme Court denied the City's petition for review directed at the holding of an unconstitutional taking but, at the same time, it granted the landowner's petition for review (Petitioner's Appendix at 45a) in order to decide whether "a landowner is entitled to money damages for a temporary taking of property by reason of an invalid zoning ordinance." (Petitioner's Appendix at 30a).

This denial of the City's petition for review was the final act of the highest court in the state on the taking issue. [1] If that is the issue on which review is sought, the petition comes too late. The time for filing it has long since expired, including the discretionary additional time allowed by 28 U.S.C. § 2101(c).

The Arizona Supreme Court ultimately held that a landowner may be entitled to monetary damages for the period of time during which an unconstitutional zoning ordinance prevents any use of the landowner's property. On a motion filed by the City, the court refused to reconsider that holding. It is apparently this denial of its motion for reconsideration which the City now relies upon as a "final judgment or decree" justifying this petition. (Petitioner's Appendix at 49a).

But that is not what the petition is about, nor is it the issue that the City asks this Court to review. Nowhere in its list of Questions Presented does the City mention the only issue decided by the Arizona Supreme Court—the right to seek compensation for an invalid zoning ordinance. (Petition at (i)).

What the City wants here is review of the taking issue and that was an issue decided by the Arizona Court of Appeals in February of 1985. When, on November 14, 1985, the Arizona Supreme Court refused to consider that issue, that refusal was *the* final judgment by the highest court in the state on the constitutional invalidity of the ordinance. The period for filing this petition began to run at that time, and it has now expired.

If, however, the foregoing analysis is incorrect, and the action of the Arizona Supreme Court on November 14 of 1985

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[1] Arizona practice does not permit the filing of a motion for reconsideration when a petition for review is denied except by specific order of the court. Rule 22(d), Arizona Rules of Civil Appellate Procedure. The City moved for permission to file such a motion, but it was denied. See Appendix B to this brief. This leaves the November 14, 1985 ruling as the final judgment of the Arizona Supreme Court on the taking issue.

was not a final judgment adequate to support a petition for certiorari, then no such judgment has yet been rendered, and this petition is consequently premature.

The City contends no more than this: "The only federal question presented in this case concerns the Taking Clause of the Fifth Amendment as read into the Fourteenth Amendment." (Petition at 6). Generally, such a "federal constitutional question embraces not only a taking, but a payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 633 (1981) (quoting *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 163 (1973)). Here, the Arizona Supreme Court remanded to the trial court the issue of damages claimed by the landowner because of the temporary prohibition on any use of her property. The retrial has not yet occurred. If the issues of taking, compensation and damages are regarded as so intertwined that the denial of review on the taking question was not a final judgment, then there has been no final judgment at all.

This Court need not decide what would constitute a reviewable judgment in this case—whether it was the final action of the Arizona Supreme Court on the taking issue or whether it will be the ultimate decision after the damage trial. Under either analysis, the present petition is untimely.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

James Powers

FENNEMORE, CRAIG, von AMMON,
UDALL & POWERS, P.C.
1700 First Interstate Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
(602) 257-8700

Counsel for Respondent

November 5, 1986

APPENDIX A

ARIZONA CONSTITUTION

Article 2, Section 17

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the State treasury for the owner on such terms and conditions as the Legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

APPENDIX B

SUPREME COURT OF ARIZONA

JOYCE M. CORRIGAN,

Plaintiff-Appellant,

vs.

CITY OF SCOTTSDALE, a municipal corporation,

Defendant-Appellee.

Supreme Court
No. 18239-PR

Court of Appeals
No. 1 CA-CIV 6300

Maricopa County
No. C-359908

ORDER

IT IS ORDERED denying Appellee's "Motion for Leave to File Motion to Reconsider Denial of Petition for Review."

DATED this 16th day of January, 1986.

/s/ WILLIAM A. HOLOHAN
Chief Justice

TO:

John P. Frank, Esq., and Michael O. Miller, Esq., Lewis & Roca, 100 West Washington, Phoenix, Arizona 85003

William E. Farrell, Scottsdale City Attorney, 3939 Civic Center Plaza, Scottsdale, Arizona 85251

S. L. Schorr, Esq., and Frank S. Bangs, Jr., Schorr, Eldridge & Bangs, P.C., 5210 East Williams Circle, Suite 600, Tucson, Arizona 85711

James Powers, Esq., Fennemore, Craig, Von Ammon, Udall & Powers, P.C., 100 West Washington, Suite 1700, Phoenix, AZ 85003

pgk

No. 86-574

In The
Supreme Court of the United States

October Term, 1986

CITY OF SCOTTSDALE, a municipal corporation,
Petitioner,

v.

JOYCE M. CORRIGAN
Respondent.

CERTIFICATE OF SERVICE

I, JAMES POWERS, a member of the Bar of this Court, hereby certify that on this 5th day of November, 1986, three copies of Respondent's Brief in Opposition on Petition for a Writ of Certiorari to the Court of Appeals State of Arizona in the above-entitled case were delivered to John P. Frank, Esq., Lewis and Roca, 100 West Washington Street, Suite 2400, Phoenix, Arizona 85003, counsel for petitioner. I further certify that all parties required to be served have been served.

James Powers

Fennemore, Craig, von Ammon, Udall
& Powers
100 West Washington Street, Suite 1700
Phoenix, Arizona 85003
(602) 257-8700
Counsel for Respondent

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 86-574

City of Scottsdale (Petitioner or Appellant) vs. Joyce M. Corrigan (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for Joyce M. Corrigan

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature James Powers

(Type or print) Name James Powers

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Fennemore, Craig, von Ammon, Udall & Powers

Address 100 West Washington Street, Suite 1700

City & State Phoenix, Arizona Zip 85003

Phone (602) 257-8700

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

No. 86-574

(3)
FILED
NOV 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF SCOTTSDALE, a municipal corporation,
Petitioner,

v.

JOYCE M. CORRIGAN,
Respondent.

PETITIONER'S REPLY BRIEF

JOHN P. FRANK*
JANET NAPOLITANO
MICHAEL O. MILLER
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003-1899
(602) 262-5311

WILLIAM E. FARRELL, ESQ.
Scottsdale City Attorney
CITY OF SCOTTSDALE
3939 Civic Center Plaza
Scottsdale, Arizona 85251
(602) 994-2405
Counsel for Petitioner

**Counsel of Record*

November, 1986

No. 86-574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF SCOTTSDALE, a municipal corporation,
Petitioner,

v.

JOYCE M. CORRIGAN,
Respondent.

Respondent, as of course she may, restricts herself to challenging the jurisdiction of this Court and does not respond as to the constitutional merit. A terse closing is sufficient:

1. Respondent contends that the decision of the Arizona Court of Appeals rests on inadequate state grounds. The decision below expressly rests on "both federal and state constitutions." Respondent does not deal in any way with *Michigan v. Long,* 463 U.S. 1032 (1983), on which we rely, and under that decision the opinion of the Arizona Court of Appeals is clearly not barred on an adequate state grounds basis.

2. Respondent contends that the petition is untimely. The court of appeals' decision held that the regulation was a taking, with all the consequences which flow from that construct. The Arizona Supreme Court did not review that question, reserving to itself only the question of whether the assumed taking required compensation. As long as there was a possibility of a holding that the federal constitution required compensation and, hence, damages, the decision of the Arizona Court of Appeals was not final, *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 633 (1981). Hence, we could not petition until that question was resolved by the Arizona Supreme Court.

It is the further position of respondent that if our petition was not too late, then it is too early. The argument is that since the state supreme court remanded for determination of damages under the state constitution, we cannot petition until that

question is resolved by the trial court; and here respondent's reliance is on *San Diego Gas & Electric Co., supra.*

But the petition is not premature. The Arizona Supreme Court unquestionably made its compensation decision exclusively on state constitutional grounds and remanded for determination of damages solely on state constitutional grounds. For the reasons set forth at p. 6 of our opening memorandum, the federal question as to the correctness of the ruling on the "taking" is thus now final. The petition is neither too early nor too late; it is at exactly the right time.

CONCLUSION

As we noted in our opening memorandum, the petition should be granted and the case should be heard as a companion to *First English Evangelical Lutheran Church v. County of Los Angeles,* 106 S. Ct. 3292 (1986) (No. 85-1199).

Respectfully submitted,

John P. Frank*
Janet Napolitano
Michael O. Miller
LEWIS AND ROCA
100 West Washington Street
Phoenix, Arizona 85003-1899
(602) 262-5311

William E. Farrell
Scottsdale City Attorney
CITY OF SCOTTSDALE
3939 Civic Center Plaza
Scottsdale, Arizona 85251
(602) 994-2405
Counsel for Petitioner

**Counsel of Record*

November, 1986